

1970

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Williamson diamonds Ltd and another v Brown

[1970] 1 EA 1 (CAD)

Division: Court of Appeal at Dar-es-Salaam

Date of judgment: 25 July 1969

Case Number: 11/1969 (117/69)

Before: Duffus VP, Law JA and Biron Ag CJ

Sourced by: LawAfrica

Appeal from: The High Court of Tanzania – Mustafa, J.

[1] *Defamation – Libel – Innuendo – Comments by the management on Safety Officer’s report – Whether plain meaning of the words defamatory – Whether words by way of innuendo constituted libel.*

[2] *Defamation – Libel – Privilege – Qualified privilege – Defendant replying to attack on his character – Occasion privileged.*

[3] *Defamation – Privilege – Qualified privilege – Malice – Bona fide but untrue accusations – Whether qualified privilege – Onus – Whether plaintiff has to establish malice.*

[4] *Appeal – Fact, findings of – Appellate court – Not bound by facts found by trial court.*

Editor's Summary

The respondent had been employed as Fire and Safety Officer at the appellant company's mines. One of his duties was to inspect the plant and to advise on matters related to the prevention of accidents. In a report of 29 July 1966 he referred to what were called "boom head pulleys" and suggested that the Mechanical Engineer should be consulted with the view of designing a suitable guard for these pulleys. The waste material resulting from the mining operations was conveyed away from the mines and dumped in the surrounding countryside by means of conveyor belts known as "boom conveyors". The conveyors had moving belts running on pulleys and the "boom head pulley" was the pulley at the end of the movable "boom". This was the position at the time the respondent made his report; but in August, a month after he made his report, another type of conveyor belt came into use, referred to as a "portable cross conveyor". This was of a more temporary nature, of limited length and could apparently be mounted on any part of the main conveyor belt. This portable conveyor did not have a boom but both the "boom conveyors" and the "portable conveyors" did have similar pulleys at the end of each system where the actual discharge of waste took place. Some time in late August 1966 a company employee was injured whilst working at the discharge end of a portable cross conveyor, and an enquiry was held into the accident by the Inspector of Mines at which the respondent gave evidence, and referred to his July report. Subsequently, the Inspector of Mines wrote to the General Manager of the appellant company informing him that it had come out at the enquiry that the respondent had in his July report made a recommendation "for the guarding of boom

head pulleys of conveyors”. He asked why this recommendation had not been carried out, and went on to suggest that if this had been done there might not have been an accident. In his reply, the General Manager stated that “the evidence submitted by our Safety Officer [at the enquiry] was rather misleading because the accident . . . did not take place at the head pulley of one of our six boom conveyors. It took place at the head pulley of a temporary stacking belt”. The appellants regarded the term “boom head pulleys” as only applied to the head pulley of a “boom conveyor”, while both the respondent and the Inspector of Mines regarded the term as applied to the head pulley in both systems of conveyors. The libel, it was alleged, was contained in the words: “Unfortunately the evidence submitted by our Safety Officer was rather misleading.” The respondent pleaded that the said words meant by way of innuendo that the respondent, when giving evidence upon oath in an enquiry into an accident, stated something which to his knowledge was false or alternatively stated something which he did not know to be true and that he intended to mislead the Inspector of Mines. The appellants submitted that “the evidence was rather misleading” because the accident did not take place at the head pulley of a boom conveyor but rather at the head pulley of a portable cross conveyor. Thus the expression “rather misleading” related only to the place where the accident occurred, and having regard to the definition as understood by them of the term “boom head pulley”, they could reasonably have come to the conclusion that the Inspector of Mines had come to a mistaken conclusion as to where the accident occurred, and therefore come to the conclusion that the management of the mines had failed to carry out a recommendation made by its own Safety Officer. The trial judge found that the words complained of were not true and were defamatory; and that the words had been used on an occasion of qualified privilege, but that the publication was actuated by malice and accordingly awarded the respondent Shs. 20,000/- damages. The appellants appealed.

Held – (Duffus V.-P., and Biron, Ag. C. J., Law, J.A., dissenting)

- (i) the natural, plain and ordinary meaning of the words complained of was not, in the context as used, defamatory; the respondent’s evidence was, in fact, misleading;
- (ii) in considering the question of malice, the court should enquire whether the publication was done in the reasonable and necessary protection of the defendant; any defamatory statements, made by a person whose character or conduct has been attacked, will be privileged provided they are published bona fide and are fairly relevant to the accusation made; the defendant will be protected even though his language should be violent or excessively strong, if, having regard to all the circumstances of the case, he might have honest and reasonable grounds for believing that what he published was true and necessary for the purpose of his indication though in fact it was not so (*Hoare v. Jessop* (4) followed, *Adam v. Ward* (1) applied);
- (iii) the onus is on the plaintiff to establish malice; in this case, the respondent had failed to establish that the appellants had not acted honestly for the purpose of protecting themselves; therefore, the finding of malice could not be sustained;
- (iv) the appellate court, when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusions.

Appeal allowed; judgment and decree of lower court set aside.

Cases referred to in judgment:

(1) *Adam v. Ward*, [1917] A.C. 309.

(2) *Dinkerrai Ramkrishan Pandya v. R.*, [1957] E.A. 336.

(3) *Tanganyika Transport Co. Ltd. v. Ebrahim Nooray*, [1961] E.A. 55.

(4) *Hoare v. Jessop*, [1965] E.A. 218.

The following considered judgments were read:

Judgment

Duffus VP: This is an appeal against the judgment and decree of the High Court of Tanzania awarding damages in a libel action. The respondent brought the action against his former employer, Williamson Diamonds Limited and also against the General Manager of that Company and duly obtained judgment and a decree for damages in the sum of Shs. 20,000/- against both defendants. Both the defendants have now appealed to this Court on three grounds, that is:

- (a) that words used were wrongly held to be defamatory;
- (b) that the trial judge having held that the defence of qualified privilege applied to the publication of the defamatory article, erred in law and in fact in holding that the second appellant, the General Manager of the Company was actuated by malice; and
- (c) that the damages were excessive.

The respondent was employed by the appellant company as a fire and safety officer. The appellant company carries on the business of mining diamonds at Mwadui in Tanzania and the second appellant was its General Manager. The words complained of are contained in a letter dated 10 November 1966 written by the second appellant as General Manager of the appellant company to the Inspector of Mines at Mwanza, a Government Officer appointed by virtue of the Mining Ordinance (Cap. 123).

The facts in this case have been very fully and clearly set out by the learned trial judge but I will here again set these out especially in so far as they are relevant to this appeal. One of the respondent's duties was to inspect the mines plant and to advise on matters related to the prevention of accidents. He did so on 14 and 15 July, and his report in writing, dated 29 July 1966, is in evidence (Ex. C). The relevant portion of his report relates to what are called "boom head pulleys" and reads:

"Boom Head Pulleys:

Suggest that the Mechanical Engineer be consulted with the view of designing a suitable guard for these pulleys."

An important issue in this case depends on what is meant by the words "boom head pulleys" and indeed the alleged libel appears to have arisen out of a misunderstanding as to the meaning of these words.

It appears from the evidence that there is a great deal of waste material, i.e. the discarded earth from which diamonds have been extracted, conveyed away from the mines and dumped in the surrounding countryside by means of conveyor belts. The extent to which this is done is shown by the photographs exhibits 3 and 4. These conveyor belts are known, according to the evidence given by the officials from the mines, as "boom conveyors", because there is a "boom" at the end of each conveyor, which can be swung in an arc of 180 degrees in order that the waste material can be dumped in different places. These conveyors have moving belts running on pulleys and the "boom head pulley" is the pulley at the end of the movable boom. This was definitely the position

when the respondent carried out his inspection and prepared his report of 29 July 1966 but in August, a month after this report, another type of conveyor belt came into use, referred to as a “portable cross conveyor” or sometimes a “stacker conveyor”. This was a conveyor belt of a more temporary nature and was only about 35 to 40 feet in length and could apparently be mounted on any part of the main conveyor belt and was intended to discharge a portion of the waste material over an embankment or road. This portable conveyor did not have a boom but apparently both the “boom conveyors” and the “portable or stacker conveyors” did have similar pulleys at the end of each system where the actual discharge of waste took place. The witnesses for the appellants, that is, the Assistant Chief Engineer and the General Manager, the second appellant, both regard the term “boom head pulleys” as only applied to the head pulley of a “boom conveyor”, while both the respondent and the Inspector of Mines appeared to have regarded the term as applied to the head pulley in both systems of conveyors.

On 24 August 1966 a company employee, Pius Marikana, was injured whilst working at the discharge end of a portable cross conveyor and as a result the Inspector of Mines held an enquiry in accordance with the Mining Ordinance and found as follows:

“The Mining Ordinance (Cap. 123) (Section 89(2))

Mwanza Area Inspectorate

Mining Accident Inquiry No. 15 of 1966

Conclusion (or Finding)

As a result of Mining Accident Inquiry No. 15 of 1966 held by me at Mwadui in Shinyanga District on 13th October 1966, I am of the opinion that:

At about 3.00 a.m. on 24th August 1966, at the Tailings Dump of Mwadui Mine owned by Williamson Diamonds Ltd., Plus Marikana, Company No. 166, was injured as the result of an accident which occurred in the course of his employment as a labourer.

From the evidence available it would appear that the injured person was clearing away tailings from under the discharge end of a portable cross conveyor when his left arm was caught by the moving conveyor belt and drawn between it and the boom head pulley. It would also appear that the injured person did not heed the instructions of his headman that if the tailings became too high, to stop the conveyor before removing the tailings.

(Sgd.) S. H. VINEY,

Inspector of Mines.

15th October 1966.”

He wrote the following letter to the Manager of the appellant Company:

“Ministry of Industries, Mineral Resources and Power

Mines Division

The Officer in Charge,

Mines Division,

Mineral Resources Division,

P.O. Box 1035,

Mwanza.

The Manager,

Williamson Diamonds Limited,

P. O. Mwadui.

17th October 1966

Sir,

Accident Prevention.

I have the honour to refer to my recent inquiry into the circumstances of the accident to Pius Marikana (No. 166) which occurred on 24th August 1966, at the Tailings Dump, Mwadui Mine, and to inform you that it came out in evidence that your Safety Officer inspected this particular section of the mine at the end of July 1966, and submitted a report containing, amongst other things, a suggestion for the guarding of Boom Head Pulleys of conveyors.

I would be grateful, if you would inform me the reason why this suggestion was apparently not followed up, for if the boom head pulley of the portable cross conveyor had been guarded the accident to Pius Marikana might not have occurred.

I am Sir,

Your obedient Servant,

(Sgd.) S. Viney

Inspector of Mines

Officer in charge."

It is to be noted here that the purpose of this letter was to find out why the recommendation made by the Safety Officer of the Mines, the respondent, with regard to "boom head pulleys" had not been carried out and further goes on to suggest that if this had been done, there might have not been an accident.

It is relevant here to consider the powers of an Inspector of Mines acting on behalf of the Commissioner of Mines. The Mining Ordinance (Cap. 123) and the regulations made thereunder give wide powers to the Commissioner of Mines or any other Officer duly authorised and these include powers of inspection and general supervision over mines and in certain circumstances include power to order work in a mine to be suspended. There are extensive regulations for the safety of workmen in the mines and a breach of these regulations may not only lead to a criminal prosecution but could also be a reason for the forfeiture of a mining lease. The management of a mine must, therefore, be very much concerned by a query from the Inspector of Mines and a charge that the company has failed, not only to provide the necessary safeguards for moving machinery, but that it has failed to do so in disregard of a recommendation by its own Safety Officer, is clearly a serious matter.

The General Manager, the second appellant, replied to the letter from the Inspector of Mines as follows:

"10th November 1966.

The Inspector of Mines,
Officer in Charge,
Mineral Resources Division,
P.O. Box 1035,
Mwanza.
Dear Sir,

Accident Prevention.

Please refer to your letter reference 46/IX/76 of 17th October 1966.

Unfortunately the evidence submitted by our Safety Officer was rather misleading because the accident to Pius Marikana (No. 166), which occurred on 24th August, did not take place at the head pulley of one of our

6 boom conveyors. It took place at the head pulley of a temporary stacking belt

which was erected for the purpose of widening an embankment which was threatened by erosion.

As regards providing safety guards at the Boom Head Pulleys of conveyors, we consider that they will complicate maintenance without serving any useful purpose. These pulleys, which project beyond the rim of the tailings dump, are normally out of reach of operating personnel, and, although they have run unguarded for six and more years, we have never had an accident here. However, to avoid recriminations in the unlikely event of an accident, they have now been fitted with guards. This was not an easy matter, as must have been realised by Mr. Brown when he wrote, 'Suggest that the Mechanical Engineer be consulted with the view of designing a suitable guard for these pulleys.'

All the remaining 27 recommendations made by the Safety Officer were approved and have been completed. We have asked him to carry out accident prevention surveys more regularly in future to avoid landing our already hard pressed Engineering Department with such a formidable list of work all at once, something which they cannot cope with as quickly as may be desirable.

The temporary stacking conveyor, on which the accident took place, will be fitted with a guard at the head pulley before it is used again.

Yours faithfully,

(Sgd.) G. F. Hunt

General Manager.

GJDT/mhb

c.c. 2, 3, Fire & Safety Officer."

The alleged libel, the subject of this action, appears in the second paragraph i.e. "unfortunately the evidence submitted by our Safety Officer was rather misleading". The second appellant alleged here that the evidence of the respondent was "rather misleading" because the accident did not take place at the head pulley of a boom conveyor but rather at the head pulley of a temporary stacking belt. Thus the expression "rather misleading" is related only to the place where the accident occurred and on referring to the letter from the Inspector of Mines and having regard to the definition as understood by the mining authorities of the term "boom head pulley", it does appear that the second appellant could reasonably have come to the conclusion that the Inspector of Mines had come to a mistaken conclusion as to where the accident occurred, and had also by reason of this mistake come to the erroneous conclusion that the management of the mines had failed to carry out a recommendation made by its own Safety Officer.

The second appellant states that when he wrote the letter of 10 November 1966 (Ex. F) he did not know what the plaintiff's evidence at the enquiry had been but he relied on the information given by the Inspector of Mines in his letter of 17 October (Ex.E). I will deal with this question further but a copy of the transcript of the plaintiff's evidence at the enquiry was put in evidence and as it is relevant to this issue I would set this out in full:

"Witness sworn/states:

I am employed by Williamson

Diamonds Ltd. as Fire and Safety Officer.

Q. Were you at the mines at the time of the accident to Pius Marikana.

A. No, I was on leave from 15th August 1966 to 11th October 1966.

Q. Is it part of your duty to carry out safety inspections on various sections.

- A. Yes.
- Q. When was your last inspection of the Tailings Section.
- A. 29th July 1966.
- Q. At that time was the portable cross conveyor at which the accident happened in use.
- A. No.
- Q. Were similar conveyors in use at various parts of the Tailings.
- A. Yes.
- Q. Did you make any reports about their safety conditions particularly in regards to the boom head pulleys.
- A. Yes.
- Q. Will you read out your remarks.
- A. Yes.
- ‘Boom Head Pulleys. Suggest that the Mechanical Engineer be consulted with a view to designing a suitable guard for these pulleys.’
- Q. To the best of your knowledge have these guards been designed or fitted.
- A. No.

F. A. Brown

13.10.66

Enquiry closed 10.30 a.m. Finding reserved. Sgd.”.

There were other letters exhibited and in particular a letter from the second appellant as General Manager to the respondent written on the same date as the letter to the Inspector of Mines which I will further refer to in considering the question of malice.

Issues were framed and in his judgment, the learned judge found that the words complained of were not true and were not defamatory; he then found that the words had been used on an occasion of qualified privilege but that the publication was actuated by malice and accordingly awarded the respondent Shs. 20,000/- damages.

I would now consider the first ground of appeal as to whether the words had a defamatory meaning. I have referred to the letter in which the words were used. The particular words complained of are set out in paragraph four of the plaint as follows:

“Unfortunately the evidence submitted by our Safety Officer was rather misleading because the accident to Pius Marikana (No. 166) which occurred on the 24th August, did not take place at the head pulley of one of our six boom conveyors. It took place at the head pulley of a temporary stacking belt which was erected for the purpose of widening an embankment which was threatened by erosion.”

An innuendo was pleaded as set out in paragraph six of the plaint as follows:

“By the said words the 1st and 2nd Defendants or each or both of them were understood to mean that the Plaintiff had when giving evidence upon oath in an enquiry into an accident which had occurred at the premises of the 1st Defendants, stated something which to the knowledge of the Plaintiff was intended to be and was in fact false or alternatively was something which the Plaintiff did not know to be true and that the Plaintiff had intended to and or had in fact misled the said Inspector of Mines by reason of the sworn testimony that he had given.”

The finding of the learned judge which this ground of appeal complains of reads as follows:

“Mr. Hunt has alleged that evidence at the accident Inquiry given by

the Plaintiff who was the Safety Officer of the Company was 'rather misleading'. To my mind the natural, ordinary and plain meaning of these two words in the context in which they were used would clearly be a libel upon the Plaintiff in the way of his office or calling and would be calculated to disparage him. Mr. Grumble has said that no witness has been called to testify as to whether the words complained of would bring the Plaintiff into hatred, ridicule or contempt; but the plain meaning of the words is obvious and requires no explanation of how it would be understood by a particular recipient. Publication has been admitted by the Defendants."

With respect the learned judge has not stated what was the natural, ordinary and plain meaning that he attached to these words. The respondent saw fit to plead an innuendo as set out in paragraph six of the plaint and it would appear that the judge must have attached the same meaning to these words, that the words meant that the respondent had committed perjury or, alternatively, had stated something which he did not know to be true and that he intended to mislead or had, in fact, misled the Inspector of Mines by such testimony.

Mr. Grumble for the appellants submitted that the word "rather" meant here "somewhat" or "slightly" or to a "certain degree" and thus "misleading" meant "to lead into error" so that the words only meant that the evidence given had misled and caused the Inspector of Mines to come to an incorrect conclusion. He submitted that the meaning pleaded in paragraph six of the plaint was not a necessary inference as nowhere had it been suggested that the respondent knew that the evidence was misleading and had deliberately given this evidence for the purpose or with the intention of misleading the Inspector of Mines. He suggested that the words might have meant that the evidence had been given inadvertently or in error and without any wrong motive. He submitted that if the words could be interpreted either with an innocent or with a defamatory meaning, then this would be a matter of fact for the judge sitting as a jury to decide and he complained that the learned judge here did not so direct his mind but had decided, as a matter of law, that the only meaning to be given to these words was a defamatory meaning. I agree generally that these words do not necessarily convey a charge against the respondent that he had acted in an improper manner but the judge found that the natural, plain and ordinary meaning of these words was in the context as used "defamatory". It will be necessary, therefore, to consider the relationship existing between the parties at the time that the letter complained of was written to the Inspector of Mines and, in more detail, the actual circumstances in which it was written, and then I will go on to consider the question of malice as set out in the second ground of appeal. The respondent had been working with the appellant company since 1955 and had apparently been held in high regard and been on good terms with the management. According to this record the first sign of any disagreement between the respondent and the management appears in the respondent's undated letter (Ex. I). This letter is not dated but it was written sometime between an accident to a Michigan Loader on 1 November 1966 and the reply from the General Manager (Ex. J) dated 10 November 1966. In his letter the respondent refers to a request for a salary review in January 1966 and he expresses the opinion that in view of recent alterations in "Job Status and Salary Increments to Expatriates" that he was no longer on the Senior Staff and he also states his desire to relinquish both Government appointments, i.e. as a Vehicle Inspector and as a Driving Licence Examiner, and it would seem from his third paragraph that he is stating that in order to assist the company he has in the past failed to make a true report apparently as a Vehicle Inspector, and he ends by requesting a decision as to his salary. This letter must have caused some annoyance to the management and was received before the second appellant wrote the letter complained of to the Inspector of Mines

on 10 November. Then there is also the fact that the letter from the Inspector of Mines was written on 17 October 1966 and this letter must also have been of considerable annoyance to the second appellant as it does appear both from the letter of the Inspector of Mines, and from the transcript of the evidence of the respondent that the purpose of the respondent's evidence was really to criticize the Management of the Mines for not carrying out the safety protection that he had advised. A reference to the transcript (Ex. I) shows that his evidence was only to the effect that he had recommended that a suitable guard should be provided at the head pulley of the conveyor at the time the accident occurred and that this had not been done; it is not clear from the record how the Inspector of Mines came to know about this recommendation. There was thus ample reason for the second appellant as the General Manager of the Mines to have been annoyed with the respondent and indeed in his evidence the second appellant agrees that he was irritated when he received the letter from the Inspector of Mines. The fact of his annoyance is also borne out by his letter to the respondent, also written on 10 November 1966 (Ex. J). This is a long letter and ends up with a suggestion that the respondent might have purposely "put things in a bad light". It would appear, therefore, that the General Manager did feel that the respondent had probably intended by his evidence to embarrass the management of the mine. These were all factors properly considered by the learned trial judge in arriving at his finding of malice.

On the other hand, the appellants' case is that there can be no question of malice as the second appellant was fully justified in writing as he did in that he honestly and reasonably believed that his letter was necessary in the protection of his own interest as General Manager and in the interest of the appellant company. The main consideration here is the fact that the respondent's safety recommendations of 29 July 1966 only applied to a "boom head pulley", that is the head pulley at the end of the boom of the then existing permanent boom conveyors, and did not apply to the head pulley of the new portable cross conveyors which had no boom and were not even in existence at the time of the respondent's recommendations; and accordingly, that the Inspector of Mines had wrongly queried the management for not carrying out this recommendation and further that it was apparent from the letter of the Inspector of Mines that he had made this error on account of the evidence given by the respondent. In his finding that the publication of the letter was on an occasion of qualified privilege the trial judge said:

"Another question is whether the Defendants in publishing the statement complained of did so on an occasion of qualified privilege.

Mr. Hunt was asked by the Inspector of Mines to explain why he had not put guards on the boom head pulleys and he therefore had a duty to reply to the said letter. There was clearly a legitimate common interest or duty when Mr. Hunt wrote the said letter. I would hold that the publication was made on a privileged occasion as the letter was published to protect a legitimate common interest, and the privilege extended to the secretaries and clerks who typed and received the said letter in the normal course of business."

The learned judge was, of course, quite correct in his finding but I think that in considering the question of malice, he should have more fully taken into account that the second appellant in writing and publishing this letter had, as pleaded in his defence, done so "in the reasonable and necessary protection of his own interest as the General Manager of the first defendant and in the interests of the first defendant" and at the same time have borne in mind the responsibilities and powers of the Inspector of Mines under the Mining Ordinance.

The law of defamation in Tanzania is, of course, largely derived from the common law of England. This Court in the case of *Hoare v. Jessop*, [1965] E.A. 218 fully considered this question of qualified privilege and malice and also reviewed the various English authorities. This was an appeal from the High Court of Kenya, but it equally well applies, on the facts of this case, to the law in Tanzania. I would here quote from the leading judgment given by Crabbe, J.A., when he was considering the question of the defence having written the “libel letter” in self defence and he said:

“With all due respect to the learned judge I think he erred at this point of his judgment, for having appreciated that the question of self-defence might fairly arise from the facts he should then have proceeded to consider whether the statements contained in ‘libel letter’ were necessary for the vindication of the defendants, or mere offensive recriminations. In *Gatley on Libel and Slander* (5th Edn.) at p. 255, para. 433, it is stated as follows:

‘... a person whose character or conduct has been attacked is entitled to answer such attack, and any defamatory statements he may make about the person who attacked him will be privileged, provided they are published bona fide and are fairly relevant to the accusations made. “The law justifies a man in repelling a libellous charge by denial or an explanation. He has a qualified privilege to answer the charge; and if he does so in good faith, and what he publishes is fairly an answer, and is published for the purpose of repelling the charge, and not with malice, it is privileged, though it be false.”’

The question that arises here is whether the second appellant can be guilty of malice if he honestly believed what he wrote and that this was necessary in the protection of himself and of his Company. I would also here quote the following passage from the judgment of Lord Atkinson in *Adam v. Ward*, [1917] A.C. 309 at p. 339 which in my view clearly sets out the law. This was a decision of the House of Lords in England and Lord Atkinson after considering the various authorities said:

“These authorities, in my view, clearly establish that a person making a communication on a privileged occasion is not restricted to the use of such language merely as is reasonably necessary to protect the interest or discharge the duty which is the foundation of his privilege; but that, on the contrary, he will be protected, even though his language should be violent or excessively strong, if, having regard to all the circumstances of the case, he might have honestly and with reasonable grounds believed that what he wrote or said was true and necessary for the purpose of his vindication, though in fact it was not so.”

With great respect I do not consider that the learned judge fully directed his mind to this question. The gravamen of the letter from the Inspector of Mines was to find out why the management had not carried out the safety recommendations of its own Safety Officer for, if they had, the accident might not have occurred, and the answer of the management to this query was that the accident had not happened at the pulley to which the recommendation referred. There was no question here as to whether the pulley where the accident occurred should have been protected. In fact, both the second appellant and the Assistant Chief Engineer in their evidence agree that it should have been protected and indeed its protection is required by law (see regulation 9 of the Mining Regulations (Safe Working) (Cap. 123), supp. 58) but here the second appellant was defending himself and his Company against the allegation that they had ignored a safety recommendation by their own Officer and it appears

to me that the real purpose of the second appellant's letter was to point out that this was not so.

The learned judge deals with the fact that there was a difference between the meaning attached to a "boom head pulley" as between the second appellant and the Assistant Chief Engineer on the one hand and the respondent and the Inspector of Mines on the other. He has made no direct finding on this point but I gather that the judge must have been satisfied that the second appellant genuinely believed that the term "boom head pulley" did not apply to the head pulley of a portable conveyor. In my view no other decision could have been arrived at, especially having regard to the fact that the new portable conveyors have no boom and were not in existence when the recommendations were made. I am of the view that the letter from the Inspector of Mines was wrong when it referred to "the boom head pulley of the portable cross conveyor" as being the place where the accident occurred and I consider that the second appellant was justified, and indeed under a duty for the protection of his company, to point out that the accident did not occur at a boom head pulley to which the recommendation of the Safety Officer referred. His letter did not attempt to justify the fact that the head pulley of the portable cross conveyor had no guard but was rather an explanation or defence as to whether they had carried out the recommendations of its own Safety Officer.

From the point of view of the second appellant, the Inspector of Mines must have been clearly confused as to what a "boom head pulley" was and have been misled in coming to the conclusion that the recommendation made by the respondent also applied to the head pulley of the conveyor at which the accident occurred. The second appellant admits that he had not read the evidence given by the Safety Officer before he replied to the letter from the Inspector of Mines, but I consider in view of the fact that he knew that the respondent had given evidence on behalf of the mines and also having regard to the statements made in the letter from the Inspector of Mines that he was justified in coming to the conclusion that the letter from the Inspector of Mines had been written as a result of the respondent's evidence.

The trial judge has found as a fact that the words complained of were not true and there has been no appeal against this finding. This Court, however, has to consider the letter as a whole and the meaning of the particular words complained of both in considering whether the words had a defamatory meaning and also whether the respondent had proved malice sufficient to destroy the defence of qualified privilege. The trial judge found that the evidence was not misleading because there was never any question but that the accident had happened at the head pulley of a portable conveyor. This may be so, but as I pointed out, the gravamen of the whole issue is whether or not the accident had happened at a place which had not been protected in accordance with the respondent's recommendation.

After consideration it does appear to me that the respondent's evidence was, in fact, misleading. I would refer here to the transcript of his evidence which I have already set out. As I read it the respondent was saying that while the portable cross conveyor at which the accident happened was not in use, there were at that time similar portable cross conveyors in use and that he had recommended that the boom head pulleys of these conveyors should have had suitable guards designed and that this had not been done at the time he gave his evidence. I agree that it can be argued that, when he answered that similar conveyors were in use at the time of his examination, this could be extended to mean the permanent boom head conveyors which were then in use but in my view the ordinary meaning would be that similar portable cross conveyors were in use at the time and if that is so, then his evidence would have been incorrect and

this did lead the Inspector of Mines to query the manager as to why the mines had not carried out the recommendation of the respondent. It is in this respect that I am of the view that the second appellant was justified in describing the respondent's evidence as misleading.

The learned judge does not say so directly but it appears that he might have considered that the recommendation of the Safety Officer to safeguard the boom head pulley would equally well apply to the head pulley of the portable conveyor. In his judgment he said:

"Mr. Hunt would seem to accept that it was easier to get at the head pulley of a portable cross conveyor and that such a head pulley should be guarded because it is more exposed and could be more dangerous to labour. If that were so I think the letter of the Mines Inspector (Exhibit E in the agreed bundle of correspondence) would have suggested to Mr. Hunt that if the Safety Officer had suggested the guarding of the boom head pulleys of boom conveyors it would obviously have been more important for head pulleys of portable cross conveyors to be guarded."

As I have stated, both the second appellant and the Assistant Chief Engineer in their evidence accept that the head pulley of the portable cross conveyor should have been guarded, but the letter from the Inspector of Mines was enquiring why the management disregarded the Safety Officer's recommendation. In my view the second appellant was justified both in his own protection and in the protection of the Mining Company in writing to point out that this was a wrong conclusion and in doing so to have stated that the respondent's evidence was misleading, as this would appear to have been the reason for the Inspector of Mines arriving at his incorrect conclusion. The onus is on the plaintiff in a libel action in which the publication of the libel was made on an occasion of qualified privilege to prove that, in fact, the defence acted maliciously. In the circumstances of this case, therefore, the respondent had to establish that the second appellant had not acted honestly for the purpose of protecting himself and his company but had used the occasion in order to spite or harm the respondent. With great respect to the learned trial judge, the evidence in this case, in my opinion, does not establish malice against the second appellant but rather shows that he acted honestly and reasonably and was justified in writing as he did in order to protect both himself and the appellant company.

An appeal from the High Court to this Court is by way of a retrial and, as this Court has often pointed out, it is not bound necessarily to accept the findings of fact by the Court below but this Court must re-consider the evidence and make its own evaluation and draw its own conclusions although always bearing in mind that it has not had the advantage of the trial judge in seeing and hearing the witnesses. In this case, I have considered all the various factors that would show ill-will or annoyance between the second appellant and the management of the mines with the respondent but it does appear to me that the second appellant must have honestly and reasonably believed what he wrote in his reply to the Inspector of Mines and that the finding of malice cannot be sustained, and for this reason I am of the view that this appeal must be allowed. It is not, therefore, necessary to further consider whether the words are defamatory although, in my view, these words are clearly capable of bearing either a defamatory or an innocent meaning.

I would, therefore, allow this appeal and direct that the judgment and decree of the High Court be quashed and that an order be made in the Court below dismissing the action with costs to the appellants, and I would further allow the appellants the costs of this appeal, and as Biron, Acting Chief Justice, agrees, there will be an order accordingly.

Biron Ag CJ: This is an appeal from the judgment and decree of the High Court of Tanzania awarding the plaintiff Shs. 20,000/- damages for libel against Williamson Diamonds Limited, hereinafter referred to as the company, and its General Manager, Mr. George F. Hunt.

As remarked by Law, J.A., in his judgment, the facts and background to this appeal are fully set out in the judgment of Duffus, V.-P., and need not be re-stated, but I consider it necessary, if only for my own benefit in order to keep them in view, to set out the basic salient facts in so far as this appeal and my approach to it is concerned.

The plaintiff was at the material time employed as the Fire and Safety Officer at the Company, and in such capacity on 29 July 1966 he submitted an "Accident Prevention Survey Report" (Ex. C) addressed to the Chief Engineer, containing a number of recommendations and suggestions, amongst which was one which reads:

"Boom Head Pulleys: Suggest that the Mechanical Engineer be consulted with the view of designing a suitable guard for these pulleys."

The plaintiff went on overseas leave in early August 1966 and during his absence, on 24 August, an accident occurred at the mine to an employee, Pius Marikana, when his hand was caught up in some machinery and he was injured. An inquiry into the accident was conducted by a Mines Inspector, a Mr. S. Viney, on 13 October 1966, at which the plaintiff, who had by then returned from leave, gave evidence, as did Pius Marikana. The Mines Inspector duly submitted his finding (Ex. D) which reads:

"Tanganyika

The Mining Ordinance (Cap. 123) (Section 89(2))

Mwanza Area Inspectorate

Mining Accident Inquiry No. 15 of 1966

Conclusion (or Finding)

As a result of Mining Accident Inquiry No. 15 of 1966 held by me at Mwadui in Shinyanga District on 13th October 1966, I am of the opinion that:

At about 3.00 a.m. on 24th August 1966, at the Tailings Dump of Mwadui Mine owned by Williamson Diamonds Ltd., Pius Marikana, Company No. 166, was injured as the result of an accident which occurred in the course of his employment as a labourer.

From the evidence available it would appear that the injured person was clearing away tailings from under the discharge end of a portable cross conveyor when his left arm was caught by the moving conveyor belt and drawn between it and the boom head pulley. It would also appear that the injured person did not heed the instructions of his headman that if the tailings became too high, to stop the conveyor before removing the tailings.

(Sgd.) S. H. Viney,

Inspector of Mines.

15th October 1966.

Mining Form A.6."

This was followed by a letter addressed to the manager of the company (Ex. C) which reads:

“Ministry of Industries, Mineral Resources and Power Mines Division

M.S.F.49

Ref. No. 46/IX/76

The Manager,

Williamson Diamonds Limited,

P.O. Mwadui.

The Officer in Charge,

Mines Division,

Mineral Resources Division,

P.O. Box 1035,

Mwanza.

17th October 1966

Sir,

Accident Prevention

I have the honour to refer to my recent inquiry into the circumstances of the accident to Pius Marikana (No. 166) which occurred on 24th August 1966, at the Tailings Dump, Mwadui Mine, and to inform you that it came out in evidence that your Safety Officer inspected this particular section of the mine at the end of July 1966, and submitted a report containing amongst other things, a suggestion for guarding of Boom Head Pulleys of conveyors.

I would be grateful, if you would inform me the reason why this suggestion was apparently not followed up, for if the boom head pulley of the portable cross conveyor had been guarded the accident to Pius Marikana might not have occurred.

I am Sir,

Your obedient servant,

(Sgd.) S. Viney

Inspector of Mines

Officer in charge.”

HSV/MK

In reply to this letter Mr. Hunt wrote a letter dated 10 November 1966 (Ex. F) in the following terms:

“Williamson Diamonds Limited

P.O. Mwadui

10th November 1966.

The Inspector of Mines,

Officer in Charge,

Mineral Resources Division,

P.O. Box 1035,

Mwanza.

Dear Sir,

Accident Prevention

Please refer to your letter reference 46/IX/76 of 17th October 1966.

Unfortunately the evidence submitted by our Safety Officer was rather misleading because the accident to Pius Marikana (No. 166), which occurred on 24th August, did not take place at the head pulley of one of our 6 boom conveyors. It took place at the head pulley of a temporary stacking belt which was erected for the purpose of widening an embankment which was threatened by erosion.

As regards providing safety guards at the Boom Head Pulleys of Conveyors, we consider that they will complicate maintenance without serving any useful purpose. These pulleys, which project beyond the rim of the tailing dump, are normally out of reach of operating personnel, and,

although they have run unguarded for six and more years, we have never had an accident here. However, to avoid recriminations in the unlikely event of an accident, they have now been fitted with guards. This was not an easy matter, as must have been realised by Mr. Brown when he wrote, 'Suggest that the Mechanical Engineer be consulted with the view of designing a suitable guard for these pulleys.'

All the remaining 27 recommendations made by the Safety Officer were approved and have been completed. We have asked him to carry out accident prevention surveys more regularly in future to avoid landing our already hard pressed Engineering Department with such a formidable list of work all at once, something which they cannot cope with as quickly as may be desirable.

The temporary stacking conveyor, on which the accident took place, will be fitted with a guard at the head pulley before it is used again.

Yours faithfully,

(Sgd.) G. F. Hunt,

General Manager.

GJDT/mhb

c.c. 2, 3, Fire & Safety Officer."

The plaintiff took exception to paragraph 2 of the letter above set out, being of the view that it implied he had given misleading evidence at the inquiry, in fact, perjured evidence, as it was made on oath. And after an exchange of correspondence and the termination of the plaintiff's appointment with the company, he brought this action for libel against the company and Mr. Hunt.

The company and Mr. Hunt by their written statement of defence pleaded justification that the words were not defamatory, and that the communication containing the offending passage was privileged.

The issues were agreed and framed as follows:

1. Were the words complained of true?
2. If the answer to issue one is in negative are the words complained of defamatory?
3. If the answer to issue two is in the affirmative was the occasion privileged?
4. If the occasion was privileged was the publication actuated by malice?
5. If so to what damages is the plaintiff entitled?

The learned judge, after duly considering and directing himself on the evidence and on the law, answered the issues as follows:

1. The words complained of were not true.
2. The words are defamatory.
3. The publication was on an occasion of qualified privilege.
4. The publication was actuated by malice.
5. The plaintiff is entitled to Shs. 20,000/- as damages.

Before entering into consideration of the appeal, I think it necessary to set out what I consider to be the approach, function and duty of this Court in connection with this appeal. In *Dinkerrai Ramkrishan Pandya v. R.*, [1957] E.A. 336, this Court upheld a submission made therein on behalf of the appellant, and it is sufficient to quote but one passage from the judgment:

"That on the first appeal the appellant was entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon."

It would therefore, to my mind, not be sufficient for this Court to say that as there was ample evidence to support the judge's finding, it should therefore ipso facto be upheld. In the language of the dictum quoted, this Court must consider the evidence as a whole and make its own decision thereon, as it is by no means unusual to be confronted with cases wherein there is ample evidence to support both sides. This view of the Court's duty corresponds with that of Duffus, V.-P., who says in his judgment:

"An appeal from the High Court to this Court is by way of a retrial and as this Court has often pointed out, it is not bound necessarily to accept the findings of fact by the Court below but this Court must re-consider the evidence and make its own evaluation and draw its own conclusions although always bearing in mind that it has not had the advantage of the trial judge in seeing and hearing the witnesses."

I propose to deal with the issue of malice, that is, assuming that the learned judge was right in finding that the words complained of were defamatory, were not true and that the occasion was privileged, though only qualifiedly so.

In the written statement of defence it is averred inter alia that:

"The defendants had a duty to publish the said words to the Inspector of Mines who had a like duty to receive them, and the second defendant published the said words in reasonable and necessary protection of his own interests as the General Manager of the first defendant and in the interests of the first defendant."

In considering this aspect of Mr. Hunt protecting his own interests and that of the company, it is necessary, I think, and also quite sufficient, to quote a passage from one of the judgments in the cases cited by the learned Vice-President in his judgment. In *Adam v. Ward*, [1917] A.C. 309, a House of Lords case, Lord Atkinson, after reviewing the various authorities, said (at p. 339):

"These authorities, in my view, clearly establish that a person making a communication on a privileged occasion is not restricted to the use of such language merely as is reasonably necessary to protect the interest or discharge the duty which is the foundation of his privilege; but that, on the contrary, he will be protected, even though his language should be violent or excessively strong, if, having regard to all the circumstances of the case, he might have honestly and on reasonable grounds believed that what he wrote or said was true and necessary for the purpose of his vindication, though in fact it was not so."

The approach to the question whether Mr. Hunt, in making the statement complained of, did so honestly in the belief that it was true, is, to my mind, subjective and not objective. One is, I think, spared adopting the standard of that rather mythical creature, the reasonable man. To ascertain what was in Mr. Hunt's mind when he made the statement complained of, it is trite to observe, is a well-nigh impossible task, but it must nevertheless be undertaken by the Court. An eminent English judge once observed that "the Devil alone knoweth what goeth on in the heart of man". And little assistance is to be expected from that quarter.

In order to arrive at what was in Mr. Hunt's mind when he made the offending statement, one tries to discover what is concealed from what is revealed, first and foremost being *sermo est animi index*.

Let us first examine what Mr. Hunt himself had to say, and he is naturally

in the best position to reveal what was in his mind. He stated in his evidence, inter alia:

“From that letter I understand that in his view the Mines Inspector considered that there was a boom head pulley on the stacking belt – the term we use for the portable cross conveyor – and that we had been asked to guard the boom head pulley on the stacking belt in the report of the Safety Officer and that we had not done so. I was rather concerned about this because it appeared to me that the Inspector of Mines must have been misled by inaccurate terminology or by lack of adequate explanation and in a subsequent letter in which my remarks were complained of I stated that. That was all I had in mind when I wrote the letter Exh. F.”

And he said:

“I admit I was a little bit irritated this matter should have happened at all, because I thought that Mr. Brown ought to have made it clear in his evidence and I considered him responsible for the confusion.”

And again:

“I never at any time considered that Mr. Brown gave false evidence at the enquiry, nor that I had considered he had committed perjury.”

It is also not irrelevant to set out a question and answer in cross-examination:

“Q. Having read Exh. D and Exh. E, not knowing what evidence Mr. Brown had given not making any enquiries about the nature of his evidence – would it be proper for you to write in Exh. F the following words – ‘The evidence submitted by our Safety Officer was rather misleading’.

A. If the whole sentence in that para. is read it was quite justified for me to say what I did say.”

Further, at that same stage of cross-examination Mr. Hunt stated:

“My intention was to clear up the terminology and not to hurt Mr. Brown.”

And the very last sentence of his evidence which, incidentally, was in cross-examination, there being no re-examination, was:

“I had no malice in my heart against Mr. Brown. I acted in good faith in writing Exh. E without enquiry as to what Mr. Brown had actually given in evidence.”

The question in effect narrows down to: was Mr. Hunt telling the truth in this last statement when he said that he had no malice in his heart, or was he lying? And that in a nutshell is the whole question in so far as the issue of malice is concerned.

In considering and answering this question, it cannot, I think, be overstressed that the onus is on the plaintiff to establish malice; that is, that Mr. Hunt, when he made the offending statement, was actuated by malice. I must stress that for the plaintiff to succeed, it must be established that, at the time he made the statement, Mr. Hunt was actuated by malice, and that the crucial time is when he wrote the letter, that is the moment of truth – or untruth. In trying to determine what was in Mr. Hunt’s mind at that time, whether he was, as he maintains, trying to correct the false impression apparently created in the mind of the Mines Inspector by the confusion in terminology, or whether he was actuated by malice, it is, I think, of assistance to refer to the evidence of Mr. H. N. J. Kelly, the Assistant Chief Engineer of the company, who is a qualified engineer holding a degree and a diploma. He stated:

“During the time I have been with the company I have not come across anybody referring (to) a portable cross conveyor as a boom conveyor. I have heard of the expression boom conveyor used on the mines, used quite frequently among engineering staff associated with the process plant.

I would not think if anyone asks a person to go to the portable cross conveyor head pulley he would go to a boom conveyor head pulley. Definitely my staff would know the difference between these two.”

The plaintiff, however (who has no engineering qualifications; he had previously been a police officer and also a fire officer, and he himself stated: “I have never been a fitter or a turner nor have I any qualifications as a safety officer. I only use my common sense.”), stated:

“There is no difference between a boom head pulley and head pulley – to me they mean the same thing.”

As remarked, the crucial moment at which the state of mind of Mr. Hunt is to be determined is when he wrote the offending passage in the letter. Incidentally, according to Mr. Hunt, and there is nothing to dispute this, his letter was drafted by the Assistant General Manager, a Mr. du Toit. Although not very much turns on that, as Mr. Hunt stated in his evidence that he agreed with and signed the letter, it is not entirely without significance, as it would indicate that the Assistant General Manager took the same view of the letter from the Inspector of Mines as did Mr. Hunt. I have deliberately refrained from setting out the plaintiff’s evidence at the inquiry conducted by the Mines Inspector (Exh. I), as I consider it not only immaterial and irrelevant but even unhelpful in the inquiry and consideration of Mr. Hunt’s state of mind at the time he wrote the letter, the subject matter of the libel, as he had not at the time seen the record of the plaintiff’s evidence; though I think he can be faulted for not having called for it before writing his letter. The material before Mr. Hunt at the time he wrote the letter containing the offending passage was the Mines Inspector’s finding, and his letter which latter specifically called for Mr. Hunt’s reply to the criticism levelled therein. I now propose to examine this material. As noted in his finding, the Mines Inspector said that the injured man’s arm was

“caught by the moving conveyor belt and drawn between it and the boom head pulley”

and in his letter to the manager (Exh. E) he stated:

“that it came out in evidence that your Safety Officer inspected this particular section of the mine at the end of July 1966, and submitted a report containing, amongst other things, a suggestion for the guarding of Boom Head Pulleys of conveyors.

I would be grateful if you would inform me the reason why this suggestion was apparently not followed up, for if the boom head pulley of the portable cross conveyor had been guarded the accident to Pius Marikana might not have occurred.”

Without indulging in a close examination and minute analysis of the Mines Inspector’s finding and letter, to my mind a straightforward perusal of them gives the impression that the plaintiff had recommended or suggested that the boom head pulley of the conveyor or, at lowest, the type of conveyor that caused the accident to Pius Marikana, should be guarded; whereas, in truth, and as the plaintiff himself stated in evidence, he had recommended only the guarding of the boom head pulleys. The particular type of conveyor, that is, the portable cross conveyor or as it is also known, the stacker conveyor, which caused the accident, was not in use at the mine when the plaintiff made his

report. In fact, as he himself stated in evidence, he had never seen one before he went on leave. Therefore I can see no reason for disbelieving Mr. Hunt when he said in his evidence that he so read and construed the finding and the letter of the Mines Inspector, and he wished to make it clear that the accident did not occur at a boom head pulley, the guarding of which the plaintiff had recommended. And he explained why the plaintiff's recommendation had not been carried out, for in his opinion boom head pulleys do not require guards. I must confess that I am not at all convinced that in law Mr. Hunt was wrong in his view that boom head pulleys do not require guards, as such pulleys are ordinarily beyond the reach of personnel employed at such conveyors and therefore do not require guards. It is also pertinent to note that according to the evidence, not disputed, such boom conveyors have been in use at the mine for more than six years and have never occasioned any accident.

To my mind, apart from the fact that I see no reason why Mr. Hunt should be disbelieved when he stated that he wished to clarify the confusion caused by the misuse of terminology and there was no malice in his heart, particularly so as he qualified his comment that the plaintiff's evidence was misleading, by going out of his way to tone it down by adding the adverb "rather", I myself, on reading the finding and the letter of the Mines Inspector, would similarly have felt it my duty, in defence of the company and myself as the General Manager, to answer the criticism and clarify the position. Pausing there, that is at the time Mr. Hunt wrote his letter which contained the offending passage, it would appear that at such stage the learned judge was prepared to believe that Mr. Hunt acted in good faith, as he stated in his judgment:

"When Mr. Hunt received the letter of 17.10.66 from the Mines Inspector (Exh. E in the agreed bundle of correspondence) it could perhaps be argued that he could possibly have understood it to mean that the Mines Inspector had come to the conclusion that the accident took place at the boom head pulley of the boom conveyor."

The learned judge, however, went on to say:

"Even here I am not satisfied whether Mr. Hunt would have been justified in coming to that conclusion."

The learned judge in coming to his finding took into consideration, and quite rightly so, Mr. Hunt's subsequent remarks and conduct. In particular, he took into consideration that, even after receiving the letter from the Mines Inspector, that he did not consider the evidence of the plaintiff misleading, he persisted in his view that it was. This letter from the Mines Inspector referred to (Exh. G) reads:

"Ministry of Industries, Mineral Resources and Power

Mines Division

M.S.F.49 (Large)

The Officer in Charge,
Mineral Resources Division,
P.O. Box 1035,
Mwanza.

Ref. No. 46/IX/82

15th November 1966.

The Manager,
Williamson Diamonds Limited,
P.O. Mwaui, Shinyanga.
Sir,

Accident Prevention

I have the honour to refer to your letter dated 10th November 1966, in

reply to my 46/IX/76 of 17th October 1966, and to make it perfectly clear that the evidence of your Safety Officer was in no way misleading. In fact I accompanied him to the scene of the accident and saw for myself, in action, the cross conveyor at which the accident happened, and I also visited one of your main tailings conveyors.

Your Safety Officer when asked at the enquiry if he had inspected the Tailings Section made it plain that at the time of his inspection (29th July 1966) the cross conveyor was not in use.

It is possible that my use of the term 'boom head pulley of the portable cross conveyor' in the second paragraph of my letter under reference may have been misunderstood – it was intended to be read as a reference to the pulley at the discharge end of that conveyor.

It is agreed that the Boom Head Pulleys of your main conveyors project beyond the rim of the tailings dump and are normally out of reach of operating personnel, but the same cannot be said of the type of conveyor at which the accident happened, and I am pleased to note that the head pulley is now being guarded.

In order to avoid misunderstanding I would be grateful if you would inform your Safety Officer, Mr. F. A. Brown, that I do not consider his evidence was in any way misleading.

I am, Sir,

Your obedient servant,

(Sgd.) S. Viney

Inspector of Mines

Officer in charge.”

I

Although it is not irrelevant or immaterial that the Mines Inspector did not find the plaintiff's evidence misleading, that does not necessarily mean or imply that Mr. Hunt did not, particularly as the Mines Inspector was accompanied by the plaintiff when he conducted his inquiry into the accident to Pius Marikana, and as noted there was a difference in terminology amongst the parties, the learned judge himself remarking on the confusion caused by the different terminology employed.

The learned judge took into consideration that, even after having sight of the plaintiff's evidence at the inquiry, Mr. Hunt maintained his stance that his evidence was somewhat misleading. This evidence is set out in Exhibit 1 and reads:

“Accident Inquiry No. 15 of 1966.

3rd Witness F. A. Brown sworn states:

I am employed by Williamson Diamonds Limited as Fire and Safety Officer.

Q. Were you at the mine at the time of the accident to Pius Marikana?

A. No, I was on leave from 15th August 1966 to 11th October 1966.

Q. It is part of your duty to carry out safety inspections on various sections?

A. Yes.

Q. When was your last inspection of the Tailings Section?

A. 29th July 1966.

Q. At that time was the portable cross conveyor at which the accident happened in use?

A. No.

Q. Were similar conveyors in use at various parts of the Tailings?

A. Yes.

Q. Did you make any report about their safety condition particularly in regards to the boom head pulleys?

A. Yes.

Q. Will you please read your remarks?

A. Yes.

‘Boom Head Pulleys. Suggest that the Mechanical Engineer be consulted with a view to designing a suitable guard for these pulleys.’

Q. To the best of your knowledge have these guards been designed or fitted?

A. No.

Signed F. A. Brown

13.10.66.”

With respect, I can see no reason why Mr. Hunt should have changed his view after having sight of this record of the plaintiff’s evidence, for even considered objectively it is, to my mind, somewhat misleading, as the import of it is that there were similar conveyors to the one which caused the accident in use when the plaintiff made his report and recommended that the head pulleys be guarded; whereas, in fact, as noted, not only were there no such conveyors in use at the time, but the plaintiff himself had not as yet even seen one. I there fore fail to see why this should be held against Mr. Hunt.

The learned judge was perfectly justified in taking into consideration Mr. Hunt’s subsequent remarks and conduct in order to determine whether when he wrote the offending letter, he was actuated by malice or not, but in my judgment such remarks and conduct are equally consistent with an honest and genuine belief that the plaintiff’s evidence was rather misleading, as with the opposite alternative. In fact there is even a third alternative, in that although Mr. Hunt may have subsequently realised that the plaintiff’s evidence was not in fact misleading, in view of the plaintiff’s subsequent conduct, according to Mr. Hunt he was making a mountain out of a molehill, Mr. Hunt dug his heels in and refused to budge from the original stance he had taken up, though this possibility may be rather remote.

As remarked, and I think that this cannot be over-stressed, though possibly I may have done so, the material crucial moment at which Mr. Hunt’s state of mind is to be adjudged, is when he made the offending statement. And at that time all Mr. Hunt had before him was the Mines Inspector’s finding and his letter. Even the plaintiff stated that the Mines Inspector had misreported him. He said:

“In my evidence I did not say where the accident took place”

and again:

“I look at Exh. E (Mines Inspector’s letter). It is not correct when he says ‘It came out in evidence that your Safety Officer inspected this particular section of the Mine at the end of July 1966 . . .’ because that section in which Pius was injured was never fixed before I went on leave. I never told the Mines Inspector what he wrote in that sentence.”

In determining what was in Mr. Hunt’s mind when he made the offending statement, it is, to my mind, extremely relevant and material to note what the plaintiff himself had to say of this. He said:

“Mr. Hunt made this allegation because he was of the view what he said

was correct at the time he wrote it. I have nothing to say what Hunt's motive was. I cannot understand it."

That, to my mind, in view of the fact that this libel action has been brought by the plaintiff, should dispose of it on account of the defence that Mr. Hunt was not actuated by malice when he made the offending statement.

Although I have every sympathy for the plaintiff who, as remarked, I think, by the learned judge, was somewhat hypersensitive, on my evaluation of the evidence I cannot in conscience find that the plaintiff has discharged the onus of establishing that in making the offending remark, which the learned judge has held to be defamatory, Mr. Hunt was actuated by malice. This statement was therefore protected by privilege, although the privilege, as noted, was a qualified one.

For the reasons I have attempted to set out, I would allow the appeal, and I agree with the order proposed by the learned Vice-President.

Law JA: The facts and background to this appeal are fully set out in the judgment prepared by Duffus, V.-P., and do not need to be repeated. The first ground of appeal was that the learned trial judge erred in holding that the words complained of constituted a libel upon the respondent. These words were contained in a letter written by the second appellant to the Inspector of Mines, in answer to a letter from the Inspector asking why a recommendation by the respondent that boom head pulleys of conveyors should be guarded had not been implemented. This was in connexion with an accident involving a workman. The accident in fact occurred at the head pulley of a temporary portable cross conveyor which does not have a boom, and not at a boom head pulley. The second appellant was not only entitled, but under a duty, to point this out to the Inspector. In doing so, he used these words:

"Unfortunately the evidence submitted by our Safety Officer was rather misleading because the accident did not take place at the head pulley of one of our six boom conveyors. It took place at the head pulley of a temporary stacking belt . . .".

The evidence referred to was evidence on oath given by the respondent at an enquiry into the accident held by the Inspector. The respondent did not say, at that enquiry, that the accident took place at the head pulley of a boom conveyor, as implied by the second appellant in his letter. What he did say in relation to boom head pulleys was in answer to questions put to him by the Inspector, and according to the record of the inquiry this is what the respondent said:

"Q. When was your last inspection of the Tailings Section?

A. 29th July 1966.

Q. At that time was the portable cross conveyor at which the accident happened in use?

A. No.

Q. Were similar conveyors in use at various parts of the Tailings?

A. Yes.

Q. Did you make any reports about their safety conditions particularly in regard to the boom head pulleys?

A. Yes.

Q. Will you read out your remarks?

A. Yes. 'Boom head pulleys suggest that the Mechanical Engineer be consulted with a view to designing a suitable guard for these pulleys.'

Q. To the best of your knowledge have these guards been designed or fitted?

A. No.”

It will be seen from the above that the Inspector was well aware that the accident happened at a portable cross conveyor, and not at a boom conveyor, and that the respondent's recommendation related to boom head pulleys. The respondent did not mislead, or attempt to mislead, the Inspector as to these matters. The second appellant's letter clearly implies that the respondent by his evidence misled the Inspector into thinking that the accident took place at a boom head pulley. This was not so. Such an allegation is clearly capable of a defamatory meaning, if it was intended to mean that the respondent intentionally misled the Inspector. But it is equally capable of an innocent meaning if it was intended to mean that the respondent's evidence was honestly given but unintentionally resulted in the Inspector being misled. The learned judge came to the conclusion that the natural, ordinary and plain meaning of the words complained of, in the context in which they were used, was clearly defamatory of the respondent in the way of his office or calling as the first appellant's Safety and Fire Officer. From that I assume that the learned judge was satisfied that the innuendo pleaded in paragraph six of the plaint had been made out, and that the allegation was that the respondent had wilfully said something on oath that was untrue with the intention of misleading the Inspector. Only on strong grounds would an appellate court interfere with the finding of the court below that the words were reasonably capable of being understood to convey the imputations attributed to them. I see no reason to differ from the learned judge's finding in this respect, and I consider that this ground of appeal fails.

It is not in dispute that the words complained of were written on an occasion of qualified privilege, and the second ground of appeal is that the learned judge erred in holding that this privilege was destroyed by malice on the part of the second appellant. The learned judge dealt very thoroughly with this aspect of the case. There was evidence that the respondent was not popular with his employers at the time the letter containing the alleged libel was written. He had asked for a rise in salary; he had intimated his intention of resigning his appointments as Government Inspector of Vehicles and Driving Test Examiner, which would have inconvenienced his employers; and he had submitted a list of 28 recommendations on matters related to accident prevention at the mine which the second appellant considered as putting an undue strain on the mine's engineering department. Although the Inspector of Mines had assured the second appellant that he had not been misled by the respondent's evidence, the second appellant persisted in his allegation that the evidence was in fact misleading, and he replied on 22 February 1967 to a letter from the respondent's advocates with a letter ending with these words:

"Really we hardly think that Mr. Brown deserves any apology for this confusion."

On the same day the second appellant handed the respondent a letter terminating his services with the mine, and he candidly admitted that when doing so he used words to this effect:

"... it seems you work for the Mines Inspector. You have to go -"

In these circumstances it seems to me that there was ample evidence to support the learned judge's finding of malice on the part of the second appellant, and much as I regret not being able to agree with the learned Vice-President on this aspect of the appeal, I consider that this ground of appeal also fails.

This leaves for consideration the last ground of appeal, which complains that the damage of £1,000 awarded by the learned judge to the respondent was manifestly excessive. Mr. Grimble for the appellants has referred us to what he submits are comparable cases decided in Tanzania, in which much smaller damages were awarded. But in one case decided in 1960, the trial judge awarded

£1,000 damages for what was admittedly a serious libel, and this award was upheld on appeal to this court (*Tanganyika Transport Co. Ltd. v. Ebrahim Nooray*, [1961] E.A. 55). An appellate court will only interfere with the quantum of damages awarded when the amount is manifestly excessive or based on wrong principles or on a wrong appreciation of the evidence. It has not been made to appear to me that any such criticism can be levelled at the learned judge in this case, and I can see no reason for interfering with his award. I would dismiss this appeal.

Appeal allowed. Judgment of High Court quashed. Case dismissed with costs. Costs of the appeal to the appellants.

For the appellants:

R. S. Grimble (instructed by *Fraser Murray, Roden & Co.*, Dar-es-Salaam)

For the respondent:

C. C. Patel (instructed by *Chopra, C. C. Patel & Ruparell*, Mwanza)

El Mann v Republic
[1970] 1 EA 24 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	31 July 1969
Case Number:	15/1969 (120/69)
Before:	Sir Charles Newbold P, Duffus VP and Law JA
Sourced by:	LawAfrica
Appeal from:	The High Court of Kenya – Mwendwa, C.J. and Wicks, J.

[1] *Criminal Practice and Procedure – Autrefois acquit – Conviction quashed and accused ordered to be retried – Whether second charge barred – Criminal Procedure Code (Cap. 75), s. 354 (K.).*

[2] *Evidence – Books of account – Whether constituted by ledger cards – Evidence Act (Cap. 80), s. 37 (K.).*

[3] *Evidence – Burden of proof – Exchange Control – Allegation that a person resident outside the scheduled territories – Burden of proof placed on accused – Exchange Control Act (Cap. 113), s. 43 (3) (K.).*

[4] *Evidence – Admissibility – Exchange Control – Extra judicial statement – Answers given to questions put to accused – Whether answers obtained by inducement, threat or promise – Exchange Control Act (Cap. 113), Sched. 5, para. 1 (K.) – Evidence Act (Cap. 80), s. 26 (K.).*

[5] *Evidence – Corroboration – Answers given to questions put to accused – Whether corroboration of answers required – Exchange Control Act (Cap. 113), Sched. 5, para. 1 (K.).*

[6] Exchange Control – Information – Information required by Minister to be furnished – Time for compliance – Exchange Control Act (Cap. 113), Sched. 5, para. 1 (K.).

[7] Exchange Control – Information – Information required by Minister to be furnished – Whether obtained by inducement, threat or promise – Exchange Control Act (Cap. 113), Sched. 5, para. 1 (K.) – Evidence Act (Cap. 80), s. 26 (K.).

[8] Exchange Control – Person resident outside the scheduled territories – Definition.

Editor's Summary

The appellant was convicted under s. 7 (a) of the Exchange Control Act of the offence of making in Kenya a payment to the credit of a person resident outside the scheduled territories without the consent of the Minister, in that he paid cash to discharge a debt due by Spallino International Tours Inc. to the United Touring Co. Ltd. of Nairobi. His appeal to the High Court was dismissed and his sentence was increased. He had previously been convicted by another magistrate but on appeal the High Court quashed that conviction and

directed that the appellant be recharged before another magistrate. He appealed on the following grounds:

- (a) that his plea of autrefois acquit should have been upheld;
- (b) that the answers he gave to questions put to him under the Exchange Control Act, Sched. 5, para. 1 should not have been admitted in evidence;
- (c) that there was no corroboration of these answers;
- (d) that Spallino International Tours Inc. had not been proved to be a person resident outside the scheduled territories;
- (e) that it had not been proved that he knew that Spallino International Tours Inc. was resident outside the scheduled territories; and
- (f) that the ledger cards containing the account of Spallino International Tours Inc. with the United Touring Co. Ltd. should not have been admitted in evidence.

Held –

- (i) the High Court has four courses open to it after reversing the finding and sentence of the lower court under the Criminal Procedure Code, s. 354 (3) and an acquittal only results when the court so orders;
- (ii) in this case there was no acquittal, but an order for retrial (*R. v. Kamurnan s/o Bulejeya* (1) and *Zaver v. R.* (2) followed);
- (iii) the provisions of the Exchange Control Act, Sched. 5, para. 1 must be strictly interpreted and strictly complied with;
- (iv) the time specified for the answering of questions must be a reasonable time, but where questions can be answered immediately the answers can be requested immediately;
- (v) answers given by an accused to questions put to him under the Exchange Control Act, Sched. 5, para. 1, are subject to the safeguards provided by the Evidence Act, s. 26;
- (vi) information obtained by the proper exercise of the provisions of the Exchange Control Act, Sched. 5, para. 1, is not information obtained by any “inducement threat or promise” within the Evidence Act, s. 26;
- (vii) the answers were properly admitted in evidence;
- (viii) corroboration of the answers of the appellant was not required;
- (ix) Spallino International Tours Inc. was a “person” as defined by the Interpretation and General Provisions Act, s. 3 (1);
- (x) there was no evidence to rebut the presumption that Spallino International Tours Inc. was resident outside the scheduled territories as stated in the charge sheet;
- (xi) on the evidence the magistrate must have found that the appellant knew that Spallino International Tours Inc. was resident outside the scheduled territories;
- (xii) books of account mean the permanent records of the accounts of a business kept regularly in the course of that business and include ledger cards kept in a bin and available for entries to be made by hand or by accounting machine.

Observations by the court on:

- (a) the correct wording of an order by the High Court under the Criminal Procedure Code, s. 354 (3);
- (b) whether *Chandaria v. R.* (5) decided the question of whether liability for offences under the Exchange Control Act was absolute.

Appeal dismissed.

Cases referred to in judgment:

- (1) *R. v. Kamurnan s/o Bulejeya* (1935), 2 E.A.C.A. 122.
- (2) *Zaver v. R.* (1952), 19 E.A.C.A. 244.
- (3) *Chandaria v. R.*, [1966] E.A. 246.
- (4) *Commissioner of Customs and Excise v. Harz*, [1967] 1 All E.R. 177.
- (5) *Hashim v. R.* (Kenya High Court Criminal Appeal No. 420 of 1967) (Unreported).
- (6) *Sweet v. Parsley*, [1969] 1 All E.R. 347.

[**Editorial Note:** The decision of the High Court of Kenya on a reference to it under s. 28 (3) of the Constitution of Kenya as to the admissibility in evidence of answers to an Exchange Control questionnaire is reported at [1969] E.A. 357.]

Judgment

The following considered judgment of the court was read by **Duffus VP**: The appellant in this case was convicted by a Senior Resident Magistrate sitting in Nairobi of an offence under s. 7 (a) of the Exchange Control Act (Cap. 113). He appealed to the High Court and in a considered judgment the High Court dismissed the appeal against the conviction but increased the sentence from one year to three years' imprisonment.

The appellant now appeals to this Court. At the hearing of the appeal counsel for the appellant argued the appeal against conviction under four heads. He submitted that the Senior Resident Magistrate was wrong:

- (i) in not upholding the plea of autrefois acquit;
- (ii) in admitting in evidence the answers given by the appellant to questions put by virtue of paragraph 1 of the Fifth Schedule of the Exchange Control Act;
- (iii) in holding that there was corroboration of these answers;
- (iv) in holding that the existence of Spallino International Tours Inc. had been established.

After these various issues had been fully argued counsel for the appellant in his final address raised two further new grounds of appeal which by leave of the Court were reduced into writing and on which we then heard further submissions. These two grounds raised entirely new issues which were not taken before either the trial magistrate or before the High Court. These issues were both on points of law and were:

- (a) that it had not been proved that the appellant knew that Spallino International Tours Inc. was resident outside the scheduled territories, which raised the question as to whether the offence charged was an absolute offence; and
- (b) that there was no evidence to show that the contents of the ledger cards were true and accordingly these documents could not be relied on to establish the existence of Spallino International Tours Inc. outside the scheduled territories.

The prosecution's case established the fact that the appellant, who was a foreigner, came into Kenya for

the purposes of paying, and in fact did pay, Shs. 160,517/- in East African currency to the United Touring Company Ltd. of Nairobi and that he made this payment on behalf of Spallino International Tours Inc. of California in the United States of America on account of an

existing debt. The actual payment by the appellant was proved by the first and second witnesses, employees of the United Touring Company and also by the third witness, a Principal Investigating Officer of the Exchange Control Section of the Central Bank. In order to prove that Spallino International Tours Inc. was a person resident outside the scheduled territories, the prosecution relied on the provisions of s. 43 (3) of the Exchange Control Act, which sub-section had been added in 1968 by an amending Act. The subsection provided that in any proceedings taken against any person for an offence under the Act the court shall presume until the contrary is proved that the residence of any person at the time of the commission of the offence was as stated in the particulars of the charge or information with which the person is charged. In this case the particulars of the count on which the appellant was convicted stated:

“DAOUD HAYIME EL MANN, on or about the 23rd day of May 1968, at Nairobi within the Nairobi Area, being a person in Kenya, without the consent of the Minister, made a payment in cash of shillings 160,715/- to the credit of Spallino International Tours Incorporated of the United States a person resident outside the scheduled territories.”

The prosecution also tendered the ledger account card of the United Touring Company which had the account of Spallino International Tours Inc., and the name and address was as follows:

“Spallino International Tours,
12121 Wilshire Boulevard,
Los Angeles,
California 90025,
U.S.A.”

The answers by the appellant to the questions put by the Investigation Officer of the Central Bank in effect admitted the facts of the payment but these answers also gave some details as to how the appellant came to make this payment, including the fact that he came to Kenya especially for this purpose after having been approached by a Mr. Richard in Geneva and also that he had been given the money to pay by an Indian in Nairobi. The last witness called by the prosecution was a supervisor of the Central Bank of Kenya and he established that the appellant had not obtained the Minister’s consent to make the payment.

The appellant called no evidence but relied on the legal submissions of his advocate and after a carefully considered judgment the trial magistrate convicted the appellant on the second count of the charges before him. On the matter coming on appeal to the High Court, the High Court dismissed the appeal and confirmed the conviction but enhanced the sentence from one year to three years’ imprisonment.

We will consider the various grounds of appeal in the order in which they were argued. The first issue was on the plea of autrefois acquit. This plea is based on s. 138 of the Criminal Procedure Code which provides:

“A person who has been once tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal has not been reversed or set aside, not be liable to be tried again on the same facts for the same offence.”

The facts show that the appellant had been previously charged and convicted for this offence before a Senior Resident Magistrate in Nairobi and on appeal to the High Court that Court allowed the appeal and ordered:

“In view of this decision and in order not to prejudice any further proceedings, we find it both unnecessary and undesirable to express any opinion about the other matters on which counsel for the appellant has

relied in this appeal. We quash the conviction and set aside the sentence and we direct the appellant shall be re-charged before another Magistrate.”

This order was made by the High Court by virtue of its powers under s. 354 (3) of the Criminal Procedure Code the relevant portion of which provides:

- “(3) The court may . . .
- (a) in an appeal from a conviction –
 - (i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction, or commit him for trial; or . . . ”.

The appellant’s argument here is that the order of the High Court on the first appeal amounted to an acquittal and that in fact the appellant was discharged by the Court. The submission is that this was the effect of the words “quash the conviction and set aside the sentence”. It was submitted that “quash” according to the definition in Stroud’s Judicial Dictionary (3rd Edn.), Vol. III meant “to overthrow or annul”, that is to completely set aside; and that this meaning taken together with the fact that the Court then allowed the appellant to leave the court as a free man meant that the appellant had been acquitted and discharged.

Tanzania and Uganda have similar provisions in their Criminal Procedure Codes to those in s. 354 (3) (a) (1) of the Kenya Criminal Procedure Code and these provisions have been fully dealt with and explained in several judgments of this Court. In this respect we would refer to the various cases quoted to us by the advocate for the appellant, and in particular to the judgments of this Court in *R. v. Kamurnan s/o Bulejeya* (1935), 2 E.A.C.A. 122 and in *Zaver v. R.* (1952), 19 E.A.C.A. 244, in which the meaning of the subsection has been very clearly defined and explained by this Court. A Court of Appeal intending to act under this subsection has first to reverse the finding and sentence of the lower court and then proceed to order one of the four alternatives set out in the subsection, i.e. to

- (a) acquit the accused;
- (b) discharge the accused;
- (c) order him to be tried by a court of competent jurisdiction; or
- (d) commit him for trial.

The first essential is therefore the reversal or setting aside of the conviction and sentence and then when this is done the Court of Appeal proceeds to order whichever one of the four alternatives it thinks fit. The reversal or setting aside of the verdict is not by itself an acquittal; an acquittal only results if the court then proceeds so to order. In this case the High Court on the first appeal “quashed” the conviction and this order clearly meant that the original conviction was reversed or set aside, that is, that it no longer existed, and then the High Court ordered that the appellant be re-charged before another magistrate. We consider that it would have been preferable if the High Court had followed the words of the subsection, but there can be no doubt that order had the same result as if the appellant had been ordered to be tried by a court of competent jurisdiction. The High Court in arriving at its decision had apparently felt that it was possible that the appellant, a foreigner, had not understood the plea and that there had been some irregularity in the method of taking the plea. The High Court clearly intended that the appellant should be re-tried on the same charge and this could be the only meaning of the words “re-charge before another magistrate”.

It is a fact that the appellant left the court of his own accord when the appeal

was allowed, but an order for a re-trial does not necessarily mean that an appellant must be kept in custody. The sentence had been set aside so he was no longer a convicted person and the fact that the court allowed him to leave the court without restraint can be of no significance when there was the definite order of the court that he be re-tried before another magistrate. We can find no merit in this ground of appeal.

The second issue is the question of the admissibility in evidence of the answers given by the appellant to the questions put to him by virtue of the provisions of para. 1 of the Fifth Schedule of the Exchange Control Act. Sub-paragraph (1) of this paragraph reads as follows:

“Without prejudice to any other provisions of this Act, the Minister may give to any person in or resident in Kenya directions requiring him, within such time and in such manner as may be specified in the directions, to furnish to the Minister, or to any person designated in the directions as a person authorized to require it, any information in his possession or control which the Minister or the person so authorized, as the case may be, may require for the purpose of securing compliance with or detecting evasion of this Act”;

and sub-paragraph (5), which was added by amending Act of 1968, provides:

“Any information obtained under this paragraph shall be admissible in evidence in any prosecution for an offence under this Act of any person from whom it was obtained, or of any body corporate of which that person at the time of the commission of the offence was purporting to act as a director, general manager, secretary or other similar officer of the body corporate.”

The witness, Mr. McBrierley, who obtained the answers from the appellant, was the investigating officer of the Exchange Control Section of the Central Bank, but he was also an Assistant Superintendent of Police. The prosecution established that the powers given to the Minister under para. 1 of Part 1 of the Fifth Schedule of the Exchange Control Act had been delegated to Mr. McBrierley; and it is clear that he acted in pursuance of these powers and not in his capacity of a Police Officer in obtaining the answers. We consider that these provisions should be strictly interpreted and complied with. Counsel for the appellant submits that the requirements as to the time and manner of providing the required information have not in fact been complied with, and that unless they are strictly complied with the answers have not been properly obtained in accordance with the powers and are thus inadmissible. Paragraph 1 requires that the information be supplied within such time and in such a manner as may be specified in the directions, and the direction to the appellant stated that the information was required to be furnished immediately. This, counsel submits, was not permitted under this paragraph. The Senior Resident Magistrate fully considered the question as to the admissibility of these answers, particularly having regard to the time element. He came to the conclusion that the words “within such time” meant that the time specified had to be a reasonable time and that the requirement that the information be supplied “immediately” was the fixing of a time as required by the section. We agree with the magistrate. The magistrate pointed out there are some questions that can be answered immediately and we agree with him that in such a case the answers can be required immediately. It is quite different where the questions are involved or would necessitate the examination of books or other records before they could be answered. In this case, on the evidence accepted by the magistrate, the appellant had no difficulty in giving his answers. On the question as to the manner in which the required information should be given we can see

no objection to the information being required, as was done in this instance, to be given orally, especially where the answers were immediately recorded and verified by the appellant.

The information supplied by the appellant is, by sub-para. (5) of para. 1, admissible in evidence and we agree with counsel for the Republic that the Judges' Rules have no application here. The answers were given in the exercise of a statutory power and their admissibility is also governed by statute. These answers were not, as we have already stated, obtained by Mr. McBrierley in his capacity as a policeman but were obtained by virtue of the delegation to him of powers given to the Minister under the Exchange Control Act.

We have fully considered the case of the *Commissioner of Customs and Excise v. Harz*, [1967] 1 All E.R. 177. In that case there were no statutory provisions for the admissibility of the statement and the question was whether it was admissible at common law. In Kenya there is express statutory provision dealing with the admission by an accused person of facts tending to the proof of guilt.

Section 26 of the Evidence Act provides, inter alia, that an admission of a fact tending to the proof of guilt by an accused person shall not be admissible in criminal proceedings if the admission appears to the court to have been caused by any inducement, threat or promise having reference to the charge and proceeding from a person in authority. We are of the view that the safeguards provided by s. 26 would apply to any information obtained by virtue of questions put under the provisions of the Exchange Control Act, and that the provisions of sub-para. (5) of para. 1 of the Fifth Schedule should be construed on that basis. We should like to make it clear that information obtained by the proper exercise of the provisions contained in para. 1 of the Fifth Schedule should not be regarded as information obtained by any "inducement, threat or promise" within the meaning of s. 26 of the Evidence Act. In this case the Senior Resident Magistrate and the High Court were fully satisfied that the answers were not obtained as a result of the improper exercise of the powers contained in para. 1 and it would appear to us on the evidence that no other conclusion could have been arrived at. We are of the view, therefore, that these answers were properly admitted in evidence.

The third issue as covered by the third ground of appeal complains that the magistrate misdirected himself in finding that there was any sufficient corroboration of these answers. It is a fact that the magistrate found that the answers were corroborated by the payment of the money to the employees of the United Touring Co., and, of course, this is perfectly true, but we can find no significance in this finding, nor do we appreciate why the magistrate found it necessary to state this. Corroboration was not required, and in any event the evidence and the circumstances of the payment were the main factors on which the prosecution relied to prove that the appellant had committed the offence. We find it difficult to understand how this issue or the finding of the magistrate can possibly affect this appeal.

The fourth issue was whether the prosecution had established the existence of Spallino International Tours Inc. This issue involves two questions: first, whether Spallino International Tours Inc. were "a person" within the meaning of our laws; and secondly, whether they were "a person resident outside the scheduled territories". "Person" is defined by the Interpretation Act as "including any company or association or body of persons corporate or incorporate". The evidence shows that the appellant paid this money, on behalf of Spallino International Tours, to the United Touring Co. on account of an existing debt and that the United Touring Co. had an account in its books for this company who existed at an address in the United States of America. The

second witness for the prosecution described Spallino International Tours as a company. The definition of “a person” has been intentionally made so wide as to include any possible association or combination of human beings, and clearly no matter what is the legal status of the Spallino International Tours Inc. it must be included within the definition of a “person” within the meaning of s. 7 of the Exchange Control Act.

The prosecution rely on the 1968 amendment to s. 43 of the Exchange Control Act in order to prove that Spallino International Tours are a person resident outside the scheduled territories. The amendment added a new subsection (3) which reads:

“For the purposes of any proceedings which may be taken against any person in respect of an offence under this Act, the court shall presume, until the contrary is proved, that the residence of any person at the time of the commission of the offence was as stated in the charge or information containing the particulars of the offence with which the person is charged.”

We refer to the particulars of the charge which we have already set out. The charge states that Spallino International Tours Inc. was “of the United States a person resident outside the scheduled territories”. This was sufficient to establish the presumption of residence and no evidence was called to prove the contrary. In these circumstances the magistrate was entirely justified in his finding that Spallino International Tours Inc. was a person resident outside the scheduled territories; indeed, on the evidence he could have come to no other conclusion.

We will now consider the two new and additional grounds of appeal. The first of these grounds was that there was no evidence to prove that the appellant knew that the Spallino International Tours Inc. were resident outside the scheduled territories. This issue arose when counsel for the appellant was replying to the submissions made by counsel for the Republic that there was sufficient evidence to prove the guilt of the appellant without taking into account the answers made by the appellant. Counsel for the appellant submitted that even if these answers were taken into account it had not been proved that the appellant knew that Spallino International Tours Inc. resided outside the scheduled territories. This defence was never raised either at the trial before the magistrate or at the first appeal before the High Court. It appeared to have emerged only as the advocate for the appellant developed his argument in reply to the point that a *prima facie* case had been made out even if the answers were not taken into account. The result is that, with respect, we have not had the advantage of a full argument on the question of absolute liability from the appellant’s point of view. However, we granted counsel for the Republic a short adjournment and he has in reply to this question argued quite fully and has referred to various cases in support of his submission that the doctrine of absolute liability applies to prosecutions under the Exchange Control Act. He referred us to the recent decision of the House of Lords in England, *Sweet v. Parsley*, [1969] 1 All E.R. 347, and also to a decision of this Court, *Chandaria v. R.*, [1966] E.A. 246 and the judgment of the High Court of Kenya sitting in its appellate capacity in the case of *Hashim v. R.* (High Court Criminal Appeal No. 420 of 1967) (unreported).

We do not, however, find it necessary to consider this question of absolute liability in deciding this appeal. It is, in our view, abundantly clear on the evidence that the prosecution had established such facts as must have inevitably led the magistrate to infer that the appellant knew that Spallino International Tours Inc. was resident outside the scheduled territories. These facts established that the appellant was employed in Geneva to come to Kenya in order to effect

this payment, and that he did in fact pay this very substantial sum of Shs. 160,715/- to a Kenya firm on behalf of Spallino International Tours Inc., a company resident in the United States. There was absolutely no evidence or suggestion by the appellant that he did not know that the company, on whose behalf he had come from outside the scheduled territories to pay money, resided outside the scheduled territories. If the appellant had acted in complete ignorance of the true facts, then this would be a matter within his own peculiar knowledge. In this case he has not attempted to set up the defence of innocence, and the court is entitled to infer from the proven facts that the appellant acted with knowledge of the facts. In these circumstances it appears to us that the magistrate must have concluded that the appellant had full knowledge of what he was doing, and knew that he was paying this money for a company resident in the United States and outside the scheduled territories.

It is not therefore necessary, for the purposes of this appeal, to decide this question of absolute liability for offences under the Exchange Control Act, nor do we think that, having regard to the lack of full argument on this matter, this would be a proper case in which to express an opinion. We would, however, say that we do not regard the judgment in the case of *Chandaria v. R.* (supra) as having decided this matter.

The last issue is whether the ledger cards containing the account of Spallino International Tours were properly admitted in evidence. This again was a point of law not taken before the trial magistrate or before the High Court. The matter, however, raises an important question on the interpretation of s. 37 of the Evidence Act. Section 37 reads:

“Entries in books of account regularly kept in the course of business are admissible wherever they refer to a matter into which the Court has to enquire; but such statements shall not alone be sufficient evidence to charge any person with liability.”

The evidence of the second prosecution witness established that the documents produced in Court were the ledger cards of the United Touring Co. containing the account of Spallino International Tours and were kept in a ledger bin. No evidence was led as to the nature of the ledger bin but Mr. Potter suggests that this is a sort of shelf kept in a steel cabinet. A book is usually defined as a collection of pages bound together. In our view the words “books of account” are used here to describe the permanent records of the accounts of a business, and would include the modern method of using ledger cards kept in a bin or other receptacle where they are readily available for entries to be made by hand or by a modern accounting machine. The essentials are that these records are the permanent accounts and are regularly kept in the course of business. We are therefore of the view that the ledger cards were properly admitted in evidence in accordance with the provisions of s. 37 of the Evidence Act, and were evidence of the existence of Spallino International Tours Inc. as being a person resident outside the scheduled territories although as we have pointed out this fact had been separately established by virtue of the presumption contained in s. 43 (3) of the Exchange Control Act.

We are satisfied that the appellant was properly convicted and we dismiss the appeal.

Appeal dismissed.

For the appellant:

Sir Dingle Foot, Q.C. and B. Georgiadis

For the respondent:

K. C. Potter, Q.C. (Special Legal and Constitutional Counsel, Kenya) and *J. R. Hobbs* (Deputy Public

Prosecutor, Kenya)

East African Bata Shoe Co Ltd v Commissioner of Income Tax
[1970] 1 EA 33 (CAN)

Division: Court of Appeal at Nairobi
Date of judgment: 6 August 1969
Case Number: 8/1969 (121/69)
Before: Sir Charles Newbold P, Duffus VP, and Law JA
Sourced by: LawAfrica
Appeal from: The High Court of Kenya at Nairobi – Wicks J

[1] Income Tax – Allowance – Industrial building – Dwelling houses for employees – Whether subject to qualification that they be of no value to taxpayer – East African Income Tax (Management) Act 1958, Sched. 2, Part I, para. 5 (2).

[2] Income Tax – Allowance – Industrial building – Dwelling houses – Whether of no value – East African Income Tax (Management) Act 1958, Sched. 2, para. 5 (3).

Editor's Summary

The taxpayer appealed against the confirmation by the High Court of an income tax assessment which disallowed its claim to an allowance under Part I of the Second Schedule to the East African Income Tax (Management) Act 1958 in respect of capital expenditure on industrial buildings. The appellant erected dwelling houses which were within para. 5 (1) of the Schedule. It was agreed that the amount spent on the buildings was £80,269, that the replacement cost was £160,000 and that their value if the appellant ceased to carry on its undertaking would be £35,000, or £50,000 to a purchaser of its undertaking together with its assets. The issues were whether the qualification to the proviso to para. 5 (3) applied to the whole proviso, and if so whether the buildings would have been of little or no value to the appellant if it had ceased to carry on its trade.

Held –

- (i) the qualifying phrase in the proviso to paragraph 5 (3) applied both to buildings constructed for the occupation of staff and to welfare buildings;
- (ii) it could not possibly be said that an asset worth £35,000 was of little or no value.

Appeal dismissed.

No cases referred to in judgment.

The following considered judgments were read:

Judgment

Sir Charles Newbold P: This is an appeal by a taxpayer, the East African Bata Shoe Co. Limited and hereinafter referred to as Bata, against a decision of the High Court confirming an assessment to income tax in respect of the year of income 1963. Bata, which is a large industrial company, claimed a deduction under the provisions of Part I of the Second Schedule to the East African Income Tax (Management) Act 1958 in respect of capital expenditure on industrial buildings. The Commissioner of Income Tax and the High Court held that Bata was not entitled to the deduction.

The facts, so far as they are relevant to the issues raised on this appeal, may be very shortly stated as follows. At its industrial factory at Limuru, Bata,

over a number of years including the year of income 1963, incurred capital expenditure in the erection of dwelling houses for occupation by its staff employed at the factory. Some of the dwelling houses fell within the definition of prescribed dwelling houses for the purposes of para. 5 of the Second Schedule, as amended in 1962, and deductions were allowed in respect of the expenditure on those dwelling houses. But other dwelling houses did not fall within that definition and this appeal relates to the deduction claimed in respect of the expenditure on those other dwelling houses. Up to and including the year of income (1962), Bata had been allowed an annual deduction in respect of such expenditure under provisions generally similar though grammatically different from those which fall to be construed in this appeal. It is not in dispute that the dwelling houses in respect of which the expenditure was incurred came within the expression “industrial building” as defined in para. 5 (1) of such Schedule and would thus become entitled to the deduction were it not for the provisions of para. 5 (3) of that Schedule. It is agreed that the amount expended on the dwelling houses was £80,269 (£72,569 up to 1963 and £7,700 in 1963); that the replacement value was about £160,000; and that, on 31 December 1963, the value of the dwelling houses, if Bata had ceased to carry on its undertaking, would have been £35,000, if there was no purchaser of the undertaking, or £50,000, if there was such a purchaser who also wanted to acquire the dwelling houses.

The two issues raised on the appeal relate to the construction of para. 5 (3) of such Schedule, which paragraph reads as follows:

“Notwithstanding subparagraphs (1) and (2) but subject to subparagraph (4), the expression ‘industrial building’ does not include any building in use as, or as part of, a retail shop, showroom, office or dwelling house, or for any purpose ancillary to the purposes of a retail shop, showroom or office:

Provided that this subparagraph shall not apply to a prescribed dwelling house, or to, or to part of, a building which is a dwelling house constructed for the occupation by persons employed in any trade or undertaking referred to in subparagraph (1), or to a building constructed for the welfare of such person, if such building will cease to belong to the person carrying on such trade or undertaking on the coming to an end of a concession under which such trade or undertaking is carried on, or if the building would have little or no value to such person if he ceased to carry on such trade or undertaking on the termination of, or had little or no value to such person where such trade or undertaking ceased to be carried on during, the year of income in respect of which any claim for a deduction has been made under this Part.”

Counsel for the appellant urges, first, that the qualifying phrase “if the building would have little or no value to such person if he ceased to carry on such . . . undertaking on the termination of . . . the year of income in respect of which any claim for a deduction has been made” applies only to “a building constructed for the welfare of such person”; and, secondly, that even if that qualifying phrase also applies to “a dwelling house constructed for the occupation by persons employed in” the undertaking, on the evidence before the Court the dwelling houses in question had to Bata little or no value on 31 December 1963. If counsel succeeds on either of these submissions then Bata is entitled to the deductions it has claimed.

As regards the first submission, it is necessary to analyse para. 5 (3) in the light of the provisions of Part I of the Second Schedule to the Act. Paragraphs 1 and 2 of that Schedule permit of deductions in respect of capital expenditure

on industrial buildings and para. 5 (1) defines an industrial building in a manner which would bring within the definition the dwelling houses in question. The first part of para. 5 (3) takes out of the definition of industrial building “any building in use as . . . a retail shop, showroom, office or dwelling house . . .”. Each of the types of buildings so excluded is, it is to be noted, a building whose use is not tied specifically to the undertaking by reason of which it became an industrial building. Thus, a dwelling house could be used for residential purposes by anyone, whether or not he was employed in the particular undertaking. Were it not for the proviso to para. 5 (3) it is clear, and, indeed, it is not in dispute, that the dwelling houses in question would not be industrial buildings and thus Bata would not be entitled to any deduction. The proviso to para. 5 (3), however, subject to the qualifying phrase, reinstates within the definition of industrial building three types of building. The first is “a prescribed dwelling house”; the second is “a building which is a dwelling house constructed for the occupation of persons employed” in the undertaking; and the third is “a building constructed for the welfare of such person”. Then follows a long qualifying phrase, within which the particular words which are to be construed occur. The question is whether the qualifying phrase applies only to the third type of building, that is, welfare buildings, as counsel for the appellant urges, or does it also apply to the second, that is dwelling houses, or to all three types, that is, prescribed dwelling houses, dwelling houses and welfare buildings, as counsel for the respondent urges.

Grammatically, by reason of the comma after the words “for the welfare of such person”, the qualifying phrase, which is linked to “such building”, could refer to all three types of building as, though the word “building” is used only in the second two types and is not used in the first type, nevertheless a prescribed dwelling house must be a building and it is specifically brought within the definition of “industrial building”. Grammatically, the qualifying phrase could also refer only to the last type of building or to the last two types of building, as only in the last two types does the word “building”, to which the qualifying phrase is linked, specifically appear. In these circumstances, in order to determine the true construction of para. 5 (3) it is necessary to consider the object of Part I of the Second Schedule to the Act as that object is disclosed by the provisions of para. 5, and in particular para. 5 (3), which I have earlier analysed. In the light of this analysis I am satisfied that the object of the legislation is not to grant a deduction in respect of capital expenditure on the buildings specified in the first part of para. 5 (3), which buildings could be used for purposes quite unrelated to, and thus have a value independent of, the undertaking which brought the building into existence unless the building would have no or very little value if the undertaking ceased. Capital expenditure of this nature would not normally be allowable as a deduction in ascertaining income. While there might be good economic reason to allow such expenditure as a deduction in order to encourage industrial development where there is a danger of the undertaker being deterred by the possibility of the loss of his capital, there would not be such strong reason for that course where the asset created would have a value of its own even if the undertaking ceased to be carried on. Having regard to the object of the legislation, as I understand it, I consider that the qualifying phrase should attach to the last two types of building, that is, to welfare buildings and to buildings constructed for the occupation of the staff. It is not necessary in this appeal to consider whether it also applies to the first type, that is a prescribed dwelling house, but I incline to the view that, having regard to the separate treatment in para. 5 of a prescribed dwelling house and to the particular purpose for which such a house is designed, the qualifying phrase does not attach to that type. Being satisfied that the qualifying phrase attaches to the dwelling houses in question I reject the first submission of counsel for the appellant.

Turning now to his second submission, that is, the construction to be placed on the words “little or no value to such person”, counsel for the appellant urges, first, that the word “value” should be construed as “use” and that if Bata ceased to carry on its factory the dwelling houses would be of little or no use to it. While it is true that in some circumstances the word “value” can be synonymous with the word “use”, I am convinced that in income tax legislation dealing with expenditure which would qualify for a deduction in ascertaining income the word “value” should be construed in its normal meaning of the monetary worth of a thing. This view is reinforced by the fact that earlier in the same subparagraph the word “use” appears in the phrase “building in use as . . . a dwelling house” and had the legislature intended the entitlement to the deduction to be dependent on the use of the dwelling house to the taxpayer there appears to be no reason whatsoever why the word “use” was not used in the second case as it was in the first. Counsel for the appellant then urged that the phrase cannot be comprehended except in relation to a standard; that the standard should be the replacement cost; and that in relation to such a standard a figure of less than one-quarter of the standard could result in an amount which was of little or no value. I regret I am unable to agree. I consider that the words “little or no value” should be construed as an ordinary business man would construe them – that is, in a common sense manner. Such a business man would not say that an article with a present value of £1 had little or no value if new it cost £2; but he would say that it had little or no value if new it cost £10,000. Where the present value of an article is small, a few pounds and possibly even up to £100, a comparative standard, which would probably be the cost price of the same or a similar article, would normally be used by such a business man. But there would come a stage when the phrase would be understood in an absolute and not in a comparative sense. When that stage would be reached, and, before it was reached, the appropriate comparative value, would be a question of fact giving rise, in some cases, to considerable difficulty. I am satisfied, however, that where an asset is worth £35,000, which is the lower of the two notional values of these dwelling houses, then that figure has resulted in a value being reached which is long past the comparative stage. In my view no business man using his common sense would say that an asset worth £35,000 has little or no value. As it is agreed that the minimum notional value of these dwelling houses was £35,000 on 31 December 1963, it follows that I also reject counsel for the appellant’s second submission.

For these reasons I would dismiss the appeal. As the other members of the Court agree the appeal is dismissed with costs.

Duffus VP: I agree with the judgment of the learned President.

Law JA: I have had the advantage of reading in draft the judgment prepared by Sir Charles Newbold, P. I agree with it, and cannot usefully add anything.

Appeal dismissed with costs.

For the appellant:

W. S. Deverell (instructed by Kaplan & Stratton, Nairobi)

For the respondent:

B. C. W. Lutta (Counsel to the East African Community) and *R. O. Kwach*

Issak v Republic

[1970] 1 EA 37 (HCK)

Division: High Court of Kenya at Nairobi
Date of judgment: 4 June 1969
Case Number: 1028/1969 (123/69)
Before: Mwendwa CJ and Farrell J
Sourced by: LawAfrica

[1] Criminal Practice and Procedure – Irregularity – Magistrate trying accused in two trials at same time for different offences – Magistrate forming bad impression of accused – Conviction quashed.

Editor's Summary

An accused was under two separate trials by the same magistrate, who was also the administrative officer at Moyale. After the accused was convicted on 4 June 1968 of an offence at one trial, the other trial continued and the accused was convicted on 4 September 1968 of other offences. On appeal from the later convictions, the accused alleged that the magistrate was prejudiced against him. When convicting the accused on 4 June, the magistrate stated, "The accused though an educated man was evasive, prevaricating and unimpressive and there were many inconsistencies in his evidence. I am satisfied that he is a dishonest person."

Held – there was a possibility of prejudice and the manifest appearance of justice had not been attained.

Appeal allowed. Re-trial by another magistrate ordered.

No cases referred to in judgment.

Judgment

The following reasons for the judgment of the Court were read by **Mwendwa CJ**: The appellant was charged on three counts of theft of postal matter, contrary to s. 277 of the Penal Code. He was convicted and sentenced to nine months' imprisonment on each count, the sentences to run consecutively. He appealed to this court against his convictions and sentences, and as a result of various matters brought to our notice we quashed the convictions, set aside the sentences and directed that the appellant be retried before another magistrate of competent jurisdiction. We now give our reasons for doing so.

The original trial was held before the first class magistrate at Moyale who is not only the sole magistrate exercising jurisdiction in a very extensive district, but is also himself an administrative officer. Both these circumstances, for which the magistrate himself is in no way to blame, have given rise to criticisms by the appellant in this case, some of which may not have very much substance, but one of which seemed so fundamental that we thought that on that ground alone we had no choice but to allow the appeal.

The appellant in his amended petition of appeal raised the possibility that the magistrate might have been prejudiced against him, and in the forefront of his grounds for this suggestion he stated that the

magistrate had previously tried him and formed an adverse opinion of him. A further ground was also put forward, that the magistrate as an administrative officer had taken part in the investigation leading up to the prosecution. We have formed no opinion on the latter allegation but we mention it here, because at the original hearing of the appeal it was considered desirable on both these grounds that an affidavit

should be obtained from the appellant in support of the facts he alleged and a replying affidavit from the magistrate. This has now been done and as regards the first point, which alone we have found it necessary to consider, the magistrate has deposed as follows:

“It is true the accused had appeared before me in another case (Cr. Case No. 22 of 1968) but I had not formed adverse opinion of him as in a place like Moyale where I was the only magistrate, a prisoner to appear twice or thrice in the same court is unavoidable.”

The previous case to which the magistrate refers was also the subject of appeal in this court (Criminal Appeal No. 751 of 1968) and as it happened the record was readily available. From a comparison of the two files it emerges that the two trials before the same magistrate were proceeding at the same time. The hearing of the case now under appeal began on 21 May 1968 and continued on the 22nd and 23rd. It was then adjourned to 11 June. In the meantime the hearing in Criminal Case No. 22 of 1968 began on 24 May and continued the next day, after which it was adjourned for judgment which was delivered on 4 June. On 11 June the hearing in the other case was resumed and continued on 22 July and 30 August. Judgment was delivered on 4 September. It thus appears that subsequently to the delivery of judgment in case No. 22 of 1968, there were three further hearing days in the case now under appeal, not including the day upon which the judgment was delivered. Now, if it were true that the magistrate had formed no opinion adverse to the appellant when he convicted him on 4 June, the appellant might perhaps have had some ground for complaint, but no prejudice would in fact have been suffered. However in the course of his judgment delivered on that day the magistrate said this:

“The accused though an educated man was evasive, prevaricating and unimpressive, and there were many inconsistencies in his evidence. I am satisfied that he is a dishonest person.”

We have no doubt that when the magistrate continued with the adjourned trial of the other case, he did his best to put out of his mind all consideration extraneous to the case in which he was engaged. We take leave to doubt whether it was humanly possible to do so completely, when he had so recently expressed himself so strongly. But that is not the point. We have to put ourselves in the shoes of the appellant and ask ourselves whether he could be satisfied that in those circumstances the trial against him would be fairly conducted. It is a trite saying that justice must not merely be done, but must manifestly be seen to be done. In view of the forcible expression of opinion by the magistrate on 4 June, it is impossible to be certain that the continuance of the adjourned trial before the same magistrate did not occasion some prejudice to the appellant and the manifest appearance of justice has certainly not been attained.

When we pointed out the above facts to State Counsel he quite properly did not seek to support the conviction.

We wish once again to emphasize that in our view the magistrate was not in any way to blame, but was doing his best to administer justice in difficult circumstances.

Appeal allowed. Re-trial ordered.

For the appellant:

R. K. Shah (instructed by *A. R. Kapila & Co.*, Nairobi)

For the respondent:

O. P. Nagpal (Senior State Counsel, Kenya)

Shah v Republic
[1970] 1 EA 39 (HCK)

Division: High Court of Kenya at Nairobi
Date of judgment: 4 June 1969
Case Number: 43/1969 (124/69)
Before: Mwendwa CJ and Farrell J
Sourced by: LawAfrica

[1] Criminal Practice and Procedure – Evidence – Refusal by airport security officer to disclose source of information – Evidence Act (Cap. 80), s. 132 (K.) does not apply – Information not privileged.

[2] Evidence – Privileged information – Refusal by witness to disclose source of information – Evidence Act (Cap. 80), s. 132 (K.) not applicable – Airport security officer not within the protection of the section.

Editor's Summary

The appellant was charged with corruption contrary to s. 3 (2) of the Prevention of Corruption Act. He was convicted and sentenced to nine months' imprisonment. The charge was in respect of a sum of money alleged to have been offered by the accused to an airport security officer in consideration for his forbearing to report that he had found a drum of kerosene on the appellant's lorry, the appellant having no authority for the possession of the kerosene. The security officer admitted in the witness-box that he had been given information by an informer as to the contents of the drum found in the appellant's lorry but when he was asked to disclose the name of his informer, the magistrate ruled that the witness fell within the protection of s. 132 of the Evidence Act. The section specifies judges, magistrates or police officers as being entitled to the privilege of refusing to disclose the source of information as to the commission of any offence and revenue officers as privileged to refuse to disclose the source of information as to the commission of any offence relating to public revenue, income tax, customs or excise.

Held –

- (i) the witness should have been compelled to disclose the name of his informer;
- (ii) the error of the magistrate was fatal to the conviction.

(**Observed** by Chief Justice Mwendwa that as State Counsel had conceded that the magistrate's ruling was incorrect, there was no need to give a considered decision on the point of law involved and the question was reserved for further consideration in a case in which there was no such agreement.)

Conviction quashed and sentence set aside.

No cases referred to in judgment.

Judgment

The following judgment of the Court was read by **Mwendwa CJ**: The appellant was convicted on a charge of corruption contrary to s. 3 (2) of the Prevention of Corruption Act. He was convicted and sentenced to nine months' imprisonment. He appeals against his conviction and sentence.

The following statement of facts is taken from the judgment:

“From the middle of December 1967 the accused was permitted by the E.A.A. Corporation to collect free of charge dirty oil from the airport,

and on each occasion that he called at the airport for this purpose he was issued with what has been described as a gate pass to remove specified number of drums of dirty oil, usually four, for collection on the day named in the pass. Likewise on 7.8.68 he was issued with gate pass to collect four drums of dirty oil. When four drums were loaded on the accused's vehicle and as he was about to leave, a Security Warden employed at the airport, Lucas Ayugi Abok, went to him and stopped him from proceeding saying that one of those four drums contained fuel. He examined the contents of those drums and one of those drums which was painted red but the paint had very much faded, was found to contain what appeared to be clean kerosene.

A specimen from this drum was later examined by the Government Chemist, Mr. Kuraguri, who found that the liquid was pure kerosene, the same as the specimen of aviation fuel a sample of which he also examined.

The above facts are not in dispute. As to the charge of corruption the Security Warden Lucas has testified that when he questioned the accused about the presence of the drum of clean kerosene the latter offered him Shs. 20/- so that Lucas should let him go. He stated that the accused picked up a piece of brown paper, took out a sheaf of currency notes from his right hip pocket, peeled off two 10/- notes, wrapped them in that yellow paper, and threw the yellow paper saying, 'There is a pound. Take it and release me.' Lucas went on to say that he picked up the yellow paper, removed the two currency notes from it and told the accused, 'I am accusing you for corrupting me.' At this the accused asked his servant who was in the vehicle to remove the drum of clean kerosene but Lucas stopped him from doing this. He sent for the Security Supervisor, and then led the accused to the main gate where the Police was called and accused handed over.'

So much for the evidence of Lucas. The magistrate then goes on to summarize the evidence of Hussein Mula, the only other witness who was present at the material time, as follows:

"The incident happened near the paint shop at the airport. One of the painters who was at that time working in the paint shop, Hussein Mula, has told the court that although he could not hear what was said between the accused and Lucas he saw the incident out of which this charge arises. According to him what he saw was that the accused picked up the yellow paper from the ground, put it in his right hand hip pocket, then brought it out again and threw it to one side. Lucas then picked it up and put it in his pocket. He then saw the accused's vehicle move a few yards and then stop again."

After considering certain discrepancies between the evidence of the two prosecution witnesses the magistrate referred to the defence as follows:

"The defence of the accused is that at the time of collecting the four drums he did not check their contents and that he collected them believing that these contained dirty oil. When Lucas pointed out to him that one of the drums contained clean kerosene he told him to remove it as he did not want clean kerosene. Lucas however refused to accept it back and had him arrested. He denied that he gave Shs. 20/- to Lucas."

There follows an account of the allegation made by the appellant that some weeks earlier Lucas had made derogatory remarks about Asians making money by collecting oil free of charge: an allegation which Lucas denied in cross-examination, though he admitted that the facility had subsequently been transferred to an African.

From this summary of the evidence it would appear that, while the prosecution case was not a strong one, there was nevertheless evidence which if it was believed entitled the magistrate to find the case proved. The magistrate gave careful consideration to the discrepancies between the prosecution witnesses and to the defence case: but he came to the conclusion after hearing and seeing Lucas in the witness-box that he was a witness of truth and, that being so, he was satisfied that the appellant was guilty of the offence with which he was charged. If there had been no more in the appeal than this, we should not have been disposed to interfere with the decision of the magistrate.

The principal ground of appeal, however, involves a point of law. Evidence was given that Lucas came on the scene at the last moment and questioned the appellant about the contents of the drums. In cross-examination he was asked where he obtained the information which led him to do this, and he stated that it was given by one of his informers. He was asked the name of the informer, and the prosecutor objected to the question. He apparently relied on s. 132 of the Evidence Act which is not material, as was pointed out by defence counsel, who went on to refer to s. 132, but noted that the privilege conferred by that section is restricted to judges, magistrates, police officers and (to a limited extent) to revenue officers. The section reads as follows:

- “(1) No judge, magistrate or police officer shall be compelled to say whence he got any information as to the commission of any offence, and no revenue officer shall be compelled to say whence he got any information as to the commission of any offence against the law relating to the public revenue or to income tax, customs or excise.
- (2) For the purposes of this section, ‘revenue officer’ means any officer employed in or about the business of any branch of the public revenue, including any branch of the income tax, customs or excise departments.”

The magistrate ruled that the witness although not strictly falling into any of the categories mentioned, was within the protection of the section and need not disclose the name of the informer.

State Counsel concedes that this ruling was incorrect, and in view of this concession we do not feel called upon to give a considered decision on a difficult point of law. For the purpose of this case we accept the position as agreed by counsel on each side that the witness should have been compelled to disclose the name of his informer, while reserving the question for further consideration if it should arise in a case where there is no such agreement. The question then is whether the error of the magistrate is one which was fatal to the conviction or one which could properly be treated as an irregularity falling within the ambit of s. 382 of the Criminal Procedure Code.

We can think of many circumstances in which such an error could be dismissed as a mere irregularity. But in this case we do not find it easy to do so. The case for the prosecution rested very heavily on the creditworthiness of Lucas. The defence case was that the drum of kerosene had been “planted”. Such allegations are by no means uncommon and if unsupported by evidence are very readily and rightly rejected by trial magistrates. But in this case there was sworn evidence from the appellant which, if believed, suggested that Lucas disapproved of the privilege granted to the appellant as an Indian, and intended to do something about it. Lucas denied the incident, but there is no finding by the magistrate that it was a fabrication. In those circumstances the defence was entitled by any legitimate means to seek to discredit Lucas, and one of the legitimate ways of doing so was to obtain an answer to the question who was his informer. The answer might have disclosed that there was no informer; if a name had been given the person named might have been called as a witness

and from his evidence useful material might have been obtained for the defence. It is idle to speculate what might have happened, since the question was disallowed. But it is conceded that the witness should have been compelled to answer the question, and it is sufficient for the purpose of this appeal that the defence was wrongly precluded from eliciting in cross-examination an answer which might have enabled them to damage the credit of the principal witness in a case which, as we have already remarked, was not a strong one. We need hardly add that if the defence had succeeded in discrediting the witnesses on a matter relating to the charge of theft on which the appellant was acquitted, the discredit would equally attach to his evidence on the charge of corruption with which this appeal is concerned.

Having regard to all the circumstances we are unable to be certain that no miscarriage of justice was occasioned by the error, and on this ground alone (without considering any other grounds of appeal) we think it right to allow the appeal.

For the reasons given we quash the conviction, and set aside the sentence. After careful consideration we have come to the conclusion that this is a proper case for an order of re-trial before another magistrate of competent jurisdiction, and we so order.

Appeal allowed. Re-trial ordered.

For the appellant:

A. R. Kapila

For the respondent:

O. P. Nagpal (Senior State Counsel, Kenya) with *Miss M. A. A. Barros D'Sa* (State Counsel, Kenya)

Musa and others v Republic [1970] 1 EA 42 (CAD)

Division:	Court of Appeal at Dar-es-Salaam
Date of judgment:	22 July 1969
Case Number:	58/1969 (115/69)
Before:	Sir Charles Newbold P, Duffus VP and Law JA
Sourced by:	LawAfrica
Appeal from:	The High Court of Tanzania – Georges, C.J.

[1] *Criminal Law – Criminal responsibility – Mistake of fact – Honest and reasonable but mistaken belief in existence of state of things – Belief must be reasonable – State of things must be factual – Mistake of law not sufficient – Penal Code (Cap. 16), s. 11 (T).*

[2] *Criminal Practice and Procedure – Trial – Open Court – Discretion of judge to hold trial in camera only to be used on rarest occasions and only when judge completely satisfied that it is necessary –*

Criminal Procedure Code (Cap. 20), s. 76 (T).

Editor's Summary

The appellants were convicted in the High Court of murdering suspected thieves. On appeal to the Court of Appeal one of the points argued for the appellants was that they had acted under a mistaken belief that the killings were lawful, which had been induced in their minds by a speech made by their M.P. During their trial the Chief Justice had on two occasions held the hearing in camera, excluding the public from the court.

Held –

- (i) in order to exculpate a person from criminal responsibility under s. 11 of the Penal Code a mistaken belief must be honest and reasonable and must be a mistaken belief of fact, not of law;

- (ii) here the mistaken belief could not be regarded as reasonable nor was it a mistake of fact;
- (iii) it is fundamental that justice should be administered in public and to hold parts of the trial in camera was irregular; but this had occasioned no failure of justice.

Observations as to how the discretion to hold a trial in camera under s. 76 of the Criminal Procedure Code should be exercised.

Appeals dismissed.

No cases referred to in judgment.

Judgment

Sir Charles Newbold P, delivered the following ex tempore judgment of the Court: This is an appeal by 14 persons against their conviction for murder and the consequent sentence of death. Each of these 14, together with three others who were acquitted by the Chief Justice, were charged on four counts, each of the counts dealing with a separate person who had been killed allegedly by each of these 14 appellants. The trial judge, having heard the evidence, convicted each of these 14 persons on two or more of the counts; only one of the appellants, that is Kaliochi, who was the third accused, was convicted on all four counts.

The evidence for the prosecution against each of these 14 persons rested broadly upon confessions which each of them made in which each of them confessed to forming part of a group of persons who had killed the deceased persons mentioned in the counts. As regards some of these appellants, that is those appellants who were accused Nos. 2, 3, 4, 6, 7, 8, 14 and 16, there was evidence corroborating their confessions. But as regards the others, there was little, if any, corroboration of the confessions, though the Chief Justice referred to the fact that one of the witnesses on the second day, that is 22 September, had seen all of the appellants among the group. Very broadly, apart from the confessions to which we have referred, the evidence for the prosecution was that the first accused, who was acquitted, in a speech made on 20 September, counselled or incited the other accused persons to commit these crimes. The Chief Justice held that he did not do so and that he was not guilty; and he held that two of the other accused persons were also not guilty. The evidence, however, in relation to the first accused who was acquitted, that is the accused who was alleged to have counselled or incited the appellants to commit the crimes, is relevant in certain respects as far as the points argued before us on this appeal are concerned.

On the appeal, counsel for the appellants have urged five points before us. The first was that the appellants should be acquitted as their cases come within the provisions of s. 11 of the Penal Code. The second was that the trial judge should not have accepted the confessions as being truthful in the circumstances of the particular cases having regard to the evidence which was given and to the inherent nature of these statements. The third was that in any event the appellants had received in law sufficient provocation to reduce their offence from that of murder to that of manslaughter. The fourth was that the trial judge was wrong in holding this joint trial in which each of the accused persons was charged with four separate murders. These first four points were dealt with by Mr. Dastur. The fifth point taken on behalf of the appellants was argued by Professor Ghai. It was to the effect that there was no common intention on the part of each of the appellants, and that as there was no specific

evidence to show that any particular act resulting in death had been done by any of the appellants, without praying in aid the provisions of s. 23 of the Penal Code, which relates to common intention, it was not possible to convict any of the appellants of the offence of murder. At the start of the hearing we also asked Mr. Chandu, who appeared for the Republic, to deal with certain matters to which we will refer later on.

Dealing with those points in the order in which they were argued, Mr. Dastur submitted that the effect of the speech which was made by the first accused on 20 September was to create in the minds of the appellants, each of whom was an uneducated peasant, the belief, an honest and reasonable belief, that he was entitled to kill indiscriminately those persons who were thieves or suspected thieves – and we use here the words used by Mr. Dastur in his submission. This submission he based upon s. 11 of the Penal Code which reads as follows:

“A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.”

It is not without significance that the side-note to that section uses the words “mistake of fact” and as we have held on previous occasions the side-notes of legislation in East Africa may be referred to in order to determine the construction of the section to which it applies. In this respect the position is different from England. Now the effect of Mr. Dastur’s submission would be that if any person or group of persons was told by anyone to commit a crime and that person or group of persons believed that they could do so then they would not be guilty of any offence. That is an astounding proposition. If it is the law then we have no alternative but to enforce it, but on the face of it it is an astounding proposition and we are satisfied that it is not the law. The section on which this submission is based refers to “an honest and reasonable belief”. We emphasise those words. Accepting for the moment that the belief here was honest – and there is a certain amount of evidence which will support such a submission – is it a reasonable belief? It is true that these persons are illiterate and rural peasants, as they have been described, but is it reasonable that any member of the community could possibly believe that because his M.P. tells him that he can go and indiscriminately kill people that he is entitled to do so. We are satisfied that that cannot be regarded as a reasonable belief. One of the witnesses made it quite clear that he would not have done so. Further, the honest and reasonable belief must be “in the existence of any state of things”. What construction is to be applied to the words “state of things”? It would seem clear, and it is reinforced by the words of the side-note, that the state of things must relate to a factual state of things. A mistake as to what the law is would not entitle a person to claim the benefit of s. 11 and absolve himself from responsibility for a criminal act merely because he thought that in law it was not a criminal act. This is abundantly clear from the general provisions of the law and is reinforced by s. 8 of the Penal Code which specifically states that ignorance of the law does not afford any excuse for any act or omission. It was urged that this act was committed by the appellants in a mistaken belief of fact. We are satisfied that this was not so. A statement by the first accused asserting incorrectly that the law had been changed and that persons were entitled to kill would not result in a mistake of fact but in a mistake of law. We are satisfied, therefore, that this first ground of appeal has no merit in it and we reject the submissions.

[The Court then dealt with other points raised by the appellants and continued:]

There were a few other matters on which we asked counsel for the State to

address us. The most important of these was the fact that on two occasions the Chief Justice held this trial in camera, excluding the public from the hearing. Now we should like to make it quite clear that justice is not a cloistered virtue. It is a tree under whose spreading branches all who seek shelter will find it. But it is a tree which flourishes only in the open, in the glare of public scrutiny, the cynosure of the eyes of each member of the community who wishes to see the actual administration of justice. If it is kept in the darkness of secrecy this tree will wither and its branches will become deformed. There is, however, a section in the law under which a court, in a proper case, may exercise its discretion and hold its sitting apart from the public. That section is 76 of the Criminal Procedure Code which reads:

“The place in which any court is held for the purpose of inquiring into or trying any offence shall be deemed an open court to which the public generally may have access, so far as the same can conveniently contain them:

Provided that the presiding judge or magistrate may, if he thinks fit, order at any stage of the inquiry into or trial of any particular case that the public generally or any particular person shall not have access to or be or remain in the room or buildings used by the court.”

It is a discretion, however, which should only be used on the rarest of occasions and then only after being completely satisfied that it is necessary. It is the presiding judge himself who has to be satisfied after he is informed of the reasons. One very good reason would be real national security. If he was satisfied that, in fact, national security would be prejudiced by holding the trial in public. In this case, on the first occasion on which the public were excluded there was a statement by counsel for the State that it was in the interest of national security and that he wished the public to be excluded. Then there is a statement by one of the defence advocates that he has no objection. These, in our view, were by no means sufficient reasons for the presiding judge to exclude the public and offend against the basic requirement of the public administration of justice. On the second occasion on which the public were excluded no reason was given for the exclusion. At no stage did the Chief Justice give any reason for this unusual action his part. On the first occasion the exclusion lasted less than one hour and on the second occasion about half a day. We consider, on the facts which were apparently placed before the Chief Justice and certainly on the facts as disclosed by the record, that the Chief Justice erred in doing what he did. We are, however, satisfied that this irregularity occasioned no failure of justice and in the circumstances we do not think that this breach of what we regard as a fundamental provision in the administration of justice is one which should result in the acquittal of these appellants. But we would like to emphasise again how fundamental it is that justice should be administered in public.

[The Court then dealt with certain other matters and concluded:]

Finally, as we have said, though the Chief Justice committed certain irregularities they were done in the course of a very long and difficult trial which placed on him, and indeed on the assessors, a very considerable burden. He shouldered this burden in an extremely able manner and considered the case against each of the appellants individually and it is not surprising that in the course of this long and difficult trial some irregularities were committed.

For these reasons the appeals of each of the appellants are dismissed.

Appeals dismissed.

For the appellants:

P. R. Dastur and Professor Y. Ghai (instructed by *R. M. Patel*, Tabora; *Kuldip Singh*, Shinyanga and *M. G. Pandya*, Shinyanga)

For the respondent:
M. Chandu (State Counsel, Tanzania)

Andrea v Republic
[1970] 1 EA 46 (HCK)

Division: High Court of Kenya at Nairobi
Date of judgment: 2 July 1969
Case Number: 461/1969 (125/69)
Before: Mwendwa CJ and Chanan Singh J
Sourced by: LawAfrica

[1] *Constitutional Law – Fundamental rights – Interpreter – Right of accused to have interpreter – Constitution of Kenya, s. 77 (2) (b) and (f).*

[2] *Criminal Practice and Procedure – Interpreter – Right of accused to interpreter – Constitution of Kenya, s. 77 (2) (b) and (f).*

Editor's Summary

The appellant, a foreigner of Mozambique origin, was convicted of being in possession of prohibited literature. On appeal against finding and sentence he contended, inter alia, that (a) he had been denied the right to employ an advocate and (b) he had been denied the right to have an interpreter to translate the proceedings into his mother tongue, or into Portuguese (s. 77 (2) (e) and (f) of the Kenya Constitution).

Held –

- (i) there was no evidence that the appellant ever asked for an advocate;
- (ii) there was a possibility that the appellant had made a statement and that he had been tried in circumstances where because of the absence of an interpreter the appellant might have misunderstood.

Appeal allowed. Re-trial ordered with an appropriate interpreter in attendance.

Cases referred to in judgment:

- (1) *R. v. Merthyr Tydfil Justices, Ex parte Jenkins*, [1967] 1 All E.R. 636.
- (2) *El Mann v. Republic* (Kenya High Court Criminal Appeal No. 622 of 1968) (unreported).

Judgment

The following judgment of the Court was read by **Mwendwa CJ**: The appellant is a foreigner of

Mozambique origin. He was found in possession of prohibited literature and was prosecuted and convicted. He now appeals against both conviction and sentence. His memorandum lists a large number of grounds. Two of these relate to fundamental technical matters unrelated to the merits of his case.

He complains that he was denied the right to employ an advocate and that no time was given to him for this purpose.

Section 77 (2) of the Constitution states that:

“Every person who is charged with a criminal offence –

- (c) shall be given adequate time and facilities for the preparation of his defence;
- (d) shall be permitted to defend himself before the court in person or by a legal representative of his own choice.”

There is nothing in the record to indicate that the appellant ever told the trial court that he wished to employ an advocate. It is usual for courts in this country to adjourn trials to enable accused persons to secure the services of advocates. We know of no case in which an adjournment for this purpose

has been refused. In fact, such a refusal would be illegal in view of the mandatory provisions of the Constitution. Since no request was made by the appellant and since such requests are made and granted as a matter of course every day, we would not be justified in allowing this appeal on this ground.

The second technical ground of appeal is stated in the memorandum thus:

- “10. I was forced to present my case in Swahili. I am not conversant with Swahili and I was unable to present my points properly.
11. I was denied the right to an interpreter who knew Portuguese or my mother tongue who could correctly convey my points in order.”

The Constitution of Kenya deals with the question of interpretation in courts in s. 77 (2) to which we have already referred. It says that every accused person

- “(b) shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence charged;

.....

- (f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge.”

Thus, on this point also our Constitution is clear. The accused is to be informed of the nature of the charge against him “in a language that he understands”. He is to be given an interpreter at Government expense if he does not understand the language of the Court.

While the record of the trial is silent on the question of the employment of an advocate, it does contain references on the subject of language. Chief Inspector Robert Shaw, who charged the appellant and took a statement from him, said this during his evidence: “I used English which accused understood. I cautioned him and he made a statement.” Here, the learned Senior Resident Magistrate made a note which reads: “Statement marked ‘M.F.I. 3’ and read by Court Clerk in Swahili to accused . . .”.

Now, why was the statement read to the accused in Swahili when it had been made in English, which language, according to Chief Inspector Shaw, the accused knew? Did the learned Senior Resident Magistrate think the accused knew more Swahili than English?

In any case, the Chief Inspector went on to say that after recording the statement he had read it back to the accused in English but that the accused had refused to sign it.

The question of language was also raised by the appellant in cross-examining Chief Inspector Shaw. The answers were as follows:

- “We were using English. I am sufficiently familiar with the language. I am capable of interpreting from Swahili but you preferred English.”

On the question of refusal to sign, the Chief Inspector’s answer was:

- “I don’t know why you refused to sign the statement. I did ask you where you had come from as I was investigating the case.”

Making a sworn statement on the issue of the admissibility of the charge-and-caution statement, the appellant said this:

- “I don’t know anything about this statement. I am not familiar with the language used to write this. I speak Portuguese. When he read this statement back to me he read it in English . . .”.

During cross-examination, the appellant said this:

“I was talking to the Chief Inspector in Swahili. I said I spoke Dajoudi or Portuguese I did not make this statement in English throughout. I went to school in Mozambique . . .”.

All this shows that the appellant was, although not directly, putting in issue the question of the language of interpretation. We realise that the Senior Resident Magistrate could not alter the circumstances in which the charge-and-caution statement had been taken but he could have arranged for interpretation into and from one or the other of the appellant’s own languages, namely Dajoudi and Portuguese. It should not have been difficult to get the services of a Portuguese interpreter.

We cannot emphasise too strongly the importance of interpreting the proceedings to the accused in the language which he understands, through an interpreter who has taken the usual interpretation oath. In *El Mann v. Republic*, High Court Criminal Appeal No. 622 of 1968, a re-trial was ordered because the proceedings had been conducted partly in a language other than the official language of the Court and it was not one hundred per cent clear that the accused had fully understood what was said. The language there used was the language of the accused himself. In the present case, the language the use of which the appellant complains was not his language. The possibility of the appellant’s misunderstanding the proceedings is, therefore, greater in this case than in the *El Mann* case.

In saying this, we do not wish to be understood as criticising in any way the conduct of the trial by the Senior Resident Magistrate. He must have been satisfied that the appellant understood the language of the proceedings. In our opinion, however, the constitutional guarantees to which we have referred require more than satisfaction on the part of the presiding officer of the trial court. They are fundamental forms of justice which are as important as the substance of it.

In *R. v. Merthyr Tydfil Justices, Ex parte Jenkins*, [1967] 1 All E.R. 636, the defendant, who was a Welshman connected with a society which was agitating for the more widespread use of Welsh in courts, was a master in an English-medium school. He pleaded to the charge in Welsh but was stopped by the Justices from cross-examining witnesses in that language because the only purpose of such cross-examination was to ventilate in court matters which were irrelevant to the issues in the trial. An appeal to the High Court was dismissed.

There is nothing in the present proceedings which indicates that the appellant is raising the issue of language for propaganda or some other improper purpose.

In our opinion, therefore, the appeal should succeed on this issue. But merely allowing the appeal will not serve the interests of justice: we think there should be a re-trial. In view of this conclusion, it is not necessary to consider other matters raised in the memorandum.

We allow the appeal, quash the conviction, set aside the sentence, and order that the appellant be retried by another magistrate with competent jurisdiction. The appellant is to be remanded in custody pending such re-trial.

Appeal allowed. Re-trial ordered.

The appellant was not represented and did not appear.

For the respondent.

J. S. Mwangi (State Counsel, Kenya)

P J Products Ltd v Haria Industries
[1970] 1 EA 49 (HCK)

Division: High Court of Kenya at Nairobi
Date of judgment: 4 July 1969
Case Number: 964/1968 (126/69)
Before: Wicks J
Sourced by: LawAfrica

[1] Passing off – Device – Colour of packet and figure on it – Whether confusion and deception likely.

Editor's Summary

The plaintiff sued the defendant for an injunction and damages for passing off, alleging that the packet in which the defendant was marketing its baking powder deceived purchasers into thinking that it was the baking powder of the plaintiff. The packets were similar in colour and both had the figure of a chef on them. There was evidence of the selling of the defendant's product when the plaintiff's product was asked for.

Held –

- (i) the get-up of the defendants' packet was similar to that of the plaintiffs';
- (ii) the similarity was such as to lead to confusion and to allow of deception;
- (iii) the plaintiff was therefore entitled to an injunction and damages.

Judgment for the plaintiff.

Cases referred to in judgment:

- (1) *Reddaway v. Banham*, [1896] A.C. 199.
- (2) *Parke Davis & Co. v. Opa Pharmacy*, [1961] E.A. 556.
- (3) *Roche Products v. DDSA Pharmaceuticals*, *Financial Times*, 15 May 1969.

Judgment

Wicks J: The plaintiffs, manufacturers of amongst other products baking powder, claim that the defendant firm has put on the market a baking powder the packets of which are calculated to lead, and have led, to the deception that the defendant's baking powder is that of the plaintiffs'. The defendants admit having put on the market a baking powder in packets but deny that their packet is a deceptive imitation of that of the plaintiffs.

The evidence of Mr. John Savage, the Managing Director of the plaintiff company, was that the company was incorporated in 1964 and took over the business of a firm named "P.J. Products". "P.J." was a combination of the initials of the Christian name of Mr. Savage's wife Patricia and his Christian name John. P.J. Products developed from being a home industry to a factory in January 1963, and at that time baking powder was put on the market packed in 4 oz. cartons. A commercial artist designed the package and it was basically the same at the time of the alleged infringement. Differences are that the packet was soon after made slightly larger, the weight was put 4 ozs. instead of 1/4 lb. and on one side-panel English was dropped and Luganda substituted. When the company was incorporated the weight was again altered to 110 gms. and "Ltd." was added after the name.

Mr. Savage said that when P.J. baking powder was put on the market there was only one other local manufacturer of baking powder, P. G. Warner & Co., who marketed their produce in tins not below 10 lbs. and the only baking powder available to housewives was imported such as "Royal" and these were

packed in 1/4 lb. tins. The problem was first a manufacturing one, to pack baking powder in packets, and then a marketing one to persuade users of baking powder, who were used to tins, that packets were satisfactory. From its introduction in January 1963 until July of that year the product made little progress. Then the British East Africa Corporation took over the marketing and sales increased steadily until the latter part of 1968 when the defendants' product in the packets complained of adversely affected the sales.

The plaintiffs' evidence related to sales based on Kisumu which covered Nyanza Province and sales based on Nairobi. The complaint related to Nyanza Province where it seems that the defendants concentrated their sales. The evidence of Mr. Joshua Okelo was that he was a taxi driver and he also owned a hotel and bakery in Kisumu. Mr. Okelo had run the bakery for about two years and he used the plaintiffs' baking powder which he knew as "P.J." On 5 November last year he went into a shop named Badiani Brothers in Kisumu and asked for a dozen P.J. baking powder. The shopkeeper put 12 packets in a bag, they were paid for and a receipt given which was put in evidence and stated, "1 dozen P.J.". When Mr. Okelo arrived home he found that he had been given six packets of P.J. baking powder and six packets of Haria baking powder, the defendants' product. On the next day Mr. Okelo went into a shop named Kassamali and asked for a dozen P.J. baking powder, they were put in a bag and again Mr. Okelo found he had been given six P.J. and six Haria packets. On the same day Mr. Okelo met a Mr. Ezekiel Ngondi, who works "for P.J." (Mr. Ngondi said he worked for East African Trading Corporation and sold P.J. products) and asked him if he had two firms in his company. Mr. Ngondi said they had P.J. alone and Mr. Okelo gave him the two paper bags each containing the baking powder and the receipts and these were put in evidence. Early in cross-examination it emerged that Mr. Okelo was illiterate but he could read dates and numbers. It also soon became clear that Mr. Okelo could not remember particular days by dates that were some months in the past and, when more than one day identified by a date has to be remembered, few witnesses can. However, the cross-examination of Mr. Okelo extended over an afternoon and a morning. The same ground was gone over again and again, by reference to dates and shop names, where he met Mr. Ngondi, who spoke first. The witness was confused and I confess I was also. There are numerous contradictions in the witness's evidence as was inevitable under the circumstances and I fail to see the value of establishing them. If Mr. Okelo was an untruthful witness all he had to do was learn three simple facts – "5th" "Badiani Bros.", "6th" "Kasamali", "then met Mr. Ngondi" – and he could not be faulted. If he was a truthful witness these events would have taken place amongst innumerable others extending back three months and unless his mind is brought to a particular event confusion in the order of events and in the events themselves is easy to create and likely to result and serve no useful purpose. Looking at Mr. Okelo's evidence, and having heard him in the witness box I am satisfied that he was speaking the truth when he said he asked for a dozen P.J. baking powder in both shops and in each case was given six packets each of the plaintiffs' and defendants' products.

The evidence of a Mr. J. M. Mukambo, a sales representative for Murphy Chemicals, also represented by British East Africa Corporation, was that he made purchases of six packets of baking powder at each of two shops in Kisumu, a receipt being put in each bag and he gave two sealed bags to Mr. Ngondi. This evidence was of no value as the witness did not identify the two bags and Mr. Ngondi failed to produce them.

In his evidence Mr. Ngondi said he was a sales manager for British East Africa Corporation and had been with the Corporation for nine years. When the plaintiffs' baking powder came on the market Mr. Ngondi was a van salesman

and he launched it in the field. At that time there were only three other brands of baking powder on the market and they were "Royal", "Pearce Duff" and "Lion" and all three were packed in 1/4 lb. tins. Mr. Ngondi in launching the plaintiffs' product went into the local markets and spoke to local people and that continued until 1965 when he was promoted to sales representative. In 1966 he was promoted to field sales manager, his present post, and throughout he has been concerned with the marketing of the plaintiffs' products.

In the middle of June last year Mr. Ngondi had a report from a Mr. John Njoroge, one of his salesmen, regarding the defendants' product. As a result Mr. Ngondi went to Nyanza Province early in July. At Kisumu he saw, mainly in wholesale shops, that there was a newly produced baking powder in packets which looked like the plaintiffs'. It was made by the defendants and the packet was like one exhibited as "E.N.2". Mr. Ngondi said he went into more than ten wholesalers in Kisumu and saw defendants' product and he went into about seven retailers and found they were stocking the defendants' product mixed with the plaintiffs' on their shelves. Mr. Ngondi went into a number of wholesalers who were their old customers and asked for repeat orders and their answer was that they were sorry, they had a new type of baking powder which is exactly like yours, the packing resembles and looks like yours, and it is cheaper in price. He got no orders. The general result of his investigation in Kisumu was that people asking for the plaintiffs' product were given the defendants' product. Mr. Ngondi called on shops in Maragoli trading centre, Broderick Falls, Kitale, Eldoret, Moiben trading centre, and Kaptagat Forest station and found the same position as in Kisumu. Mr. Ngondi went to Kisumu in November and he confirms Mr. Okelo's evidence.

Mr. Ngondi said there were three classes of customers, those who could read and write, those who can only sign their names and the third who are illiterate. To the first class the colour of the packet is not important because they can read what is on the packet, the second class know what they want by colour and the size of the article and the name and the third class asks for an article by the picture and price and would go by the colour of the packet to know if he was getting what he asked for. About 65% of customers are illiterate, about 25% can sign their names and 10% are literate.

Mr. G. N. Njoroge, a van salesman for British East Africa Corporation from whom Mr. Ngondi said he received a phone call in June last year, said he sold the plaintiffs' product mainly to African retailers. He knew how the market goes and in the middle of June when he was in Kisumu he saw there was another product on the market which was "exactly like the one I was selling". Mr. Njoroge identified the plaintiffs' packet and also the defendants'. Mr. Njoroge said that in Kisumu the customers knew the defendants' product as the plaintiffs'. Many of his customers told him they had another product just like his and it was cheaper. Mr. Njoroge said he called on 30 to 40 customers a day during June and July, in all about 58 days, when his customers told him this. Mr. Njoroge agreed that there were six or seven other makes of baking powder on the market but he said that their existence had not affected his sales but the defendants' product had because the packets and the colours of the packets were the same, and customers go by the colours. Asked if his customers understood English, Swahili and Luganda he replied that not many did, that customers who buy baking powder cannot read at all, "they ask for our baking powder or P.J. and go by the colour on the packets and Haria packets are exactly the same colour as ours".

The evidence of Mr. K. A. Eckhart was that he was general manager of the British East Africa Corporation and he has been concerned with the marketing of the plaintiffs' baking powder from the time his company took over the

marketing of it in 1963 until the present time. Mr. Eckhart gave the details of sales from 1963 until the end of last year and said that the target for last year was 7,200 cartons but the actual sales were only 5,492, that the turnover lost was Shs. 70,028/- and the loss of profit to his company as distributors was Shs. 9,800/- and this was attributed to the defendants' baking powder having been put on the market. Mr. Eckhart compared the plaintiffs' packet with that of the defendants and said, that with the mass market the most important point of sales promotion is to show the packet, that such customers cannot read what is on the packet and when a product is promoted it is by the colour combination and in this case the shape of the figure on it, a chef, and these are the things that the public look for as identifying the plaintiffs' product. Mr. Eckhart said that in the better class retail shop, when more than one brand is stocked, the brands are placed in separate groups near to one another but in other shops the brands are all mixed up on the shelves, and in the latter case customers, used to the plaintiffs' baking powder by the colour of the packet and the form of the chef, would not know the difference if he was given the defendants' baking powder.

The defendants called Mr. J. B. Badiani, a partner in Badiani Bros., Kisumu, and, when shown the six packets of P.J. baking powder and six packets of Haria baking powder and the receipt, he said that he wrote the receipt and as he put "P.J." on the receipt he gave the customer P.J. baking powder. Mr. Badiani said he could not remember making the actual sale as it was three and a half months before. It seems that after the action was begun the defendants altered the figure on their packet, the chef is almost exactly the same but the bowl is smaller and the figure of a woman has been put on the left. Mr. Badiani, asked if there were any other differences, said there were not and this seems to be so, the width of the colour bands and the colours being identical, and almost identical in position width and colours as the plaintiffs' packet. Mr. Badiani, asked when he first became aware that there were two figures on the defendants' new packet, said that was about a month ago, and he could not remember if defendants' previous packet had one or two figures on it. Mr. Badiani did not impress me favourably, his memory of past events was vague and he seems to have taken the attitude that if "P.J." was on the receipt he gave P.J. I find that he is mistaken and I accept Mr. Okelo's evidence that he was given six P.J. and six Haria packets of baking powder.

The evidence of Mr. J. P. Haria, a partner in the defendant firm, was that the defendants had manufactured curry powder since 1961 and used the same label throughout. In May 1968 the defendants started making and selling baking powder and their label was the one complained of, and the design for it was taken from their curry powder label.

The principle of law governing cases such as this is to be found in the judgment of Lord Halsbury, L.C., in *Reddaway v. Banham*, [1896] A.C. 199, at p. 204:

"Nobody has the right to represent his goods as the goods of somebody else. How far the use of particular words, signs or pictures does or does not come up to the proposition which I have enunciated in each particular case must always be a question of evidence."

The nature of the evidence that is relevant was considered in the case of *Parke Davis & Co. v. Opa Pharmacy*, [1961] E.A. 556, where at p. 559 Crawshaw, J.A., said:

"Kerly at p. 421 has, by reference to cases not available to us, given instances of the type of evidence by which a court should be guided, such as evidence that there has been no confusion, evidence of the circumstances usually attending distribution and sale of the goods under consideration,

of the type of customer and of the degree of discrimination commonly portrayed, expert evidence as to the circumstances usually attending the sale of goods in the particular trade, and as to the ordinary class of customers served, their intelligence and education, what they particularly look for in purchasing the plaintiffs' goods."

A very recent case in England is of interest. It is *Roche Products v. DDSA Pharmaceuticals* reported in the 15 May 1969 issue of the London *Financial Times*. In that case Roche had manufactured a tranquillising drug since 1960, which was prescribed by doctors as "cdp" and it had always been sold in a black and green capsule with the small letters roche on the body. The defendants had been granted a compulsory licence to manufacture the drug and they caused a colour advertisement to be put in a publication known as the *Chemist and Druggist* depicting the capsules using the identical colour "get up" as that of the plaintiffs' product. Pennycuick, J., observed that if a patient having had the plaintiffs' product before, went to the doctor for a repeat order, and the doctor prescribed cdp, without the brand name, and the pharmacist perfectly properly supplied the defendants' product,

"the patient would take for granted that the capsules supplied, being the same shape and colour as before, were the same capsules as before, and would not return them to the pharmacist, as he would probably do if the capsules were of a different shape and colour."

Pennycuick J granted a temporary injunction, which was later made perpetual as one of the terms of a settlement.

At the commencement of the hearing the defendants applied to amend their defence. Counsel for the defendants informed the court that the reason was that the defendants contend that their label was designed and adopted from their curry powder label under which they had marketed their products since 1962, that this 1962 label had been discontinued and lost and had come to light only the day before the hearing. Counsel for the plaintiffs not objecting to the amendment, it was allowed. Now if indeed the defendants' label was designed and adopted from their curry powder label introduced in 1962 and the "get up" of their baking powder label is the same as that of their curry powder label the plaintiffs, introducing their label in 1963, could have no complaint. Indeed the defendants might have cause to complain concerning the plaintiffs' label. The defendants' curry powder label was put in evidence and Mr. J. P. Haria said that the common feature between that label and their baking powder label was the chef and that was the only resemblance. Had the defendants' label been designed and adopted from their curry powder label, that is with blue and red colours and the distinctive combination of the letters "H" and "T", I think there could be no complaint even if the saucepan was replaced by a bowl. Mr. Haria said that Samidan Ltd. of Nairobi were given the curry powder label and that company did the rest. Looking at what was done the "H" and "T" combination has been abandoned and "Haria" used in letters similar in size to "P.J." on the plaintiffs' label and the chef's cap on the curry powder label has been cut off resulting in the extra letters of Haria balancing the white of the chef's cap on the plaintiffs' label. Mr. Haria agreed, referring to specific points, that there were a large number of similarities between the features of the plaintiffs' label and the defendants' label and this is clearly so. The two colours blue and yellow are almost identical shades, the width of the bands are identical, the print in some instances is of the same words, in the same position and about the same size and, looking at the packets from a distance, it is difficult to distinguish one from the other.

I accept the evidence of Mr. Nguti, Mr. Njoroge and Mr. Eckhart and I find that by reason of sales promotions and sales between the years 1963 and 1968

the plaintiffs' label had become established in the market. I am satisfied that the "get up" of the defendants' label is so similar to that of the plaintiffs as to lead to confusion and to allow of deception, that customers having become used to the plaintiffs' product in the "get up" of their packets, asking for baking powder and being given the defendants' product, would think they had the same product as before, that is the plaintiffs' product, and would not return it to the grocer as they would probably do if the defendants' product had been of a different "get up". I also find that uneducated customers asking the grocer for P.J. and being given the defendants' product would think they had been given the plaintiffs' product. The action must succeed.

The assessment of damages is no easy task. The evidence of Mr. Eckhart was that the turnover lost during 1968 was Shs. 70,028/- and the loss of profit to his company as distributors was Shs. 9,800/-. The plaintiffs complained to the defendants by their advocates' letter dated 21 June 1968 and in their advocates' reply dated 11 July 1968 said inter alia that the defendants had without admission of any liability stopped packing their baking powder in the packages in question until the matter is finalised. Counsel for the defendants submits that this letter is inadmissible being marked "without prejudice". Counsel for the plaintiffs replied that privilege could not be claimed for the reason that the evidence was that the plaintiffs acted on the assurance and did not apply for an interim injunction, as would be the normal practice on the filing of the plaint; and that the plaintiffs continued to act on the assurance and, on discovering that the defendants continued to use the label complained of, their application for an interim injunction was long delayed. The defendants are not entitled to the privilege they claim. Mr. J. P. Haria himself said that he continued selling their product in the offending label up to September, the date when the interim injunction was granted. Mr. Haria said that after October he replaced stock with packs having a new label. Mr. Savage's evidence was that as late as the end of January this year he saw one of the defendants' vehicles outside their factory with a blown up picture of the defendants' label on the back door. In his evidence Mr. Eckhart said that on 3 February this year at about 3.40 p.m. he saw the defendants' vehicle KMA 843 being driven along Uhuru Highway Nairobi and on it was an advertisement of the defendants' baking powder showing a packet exactly like the one complained of. I do not accept Mr. Haria's evidence that he took positive steps to withdraw the packets complained of from his customers. He could produce no records and the whole tenor of the defendants' evidence was that their intention is to persist, or take no positive action to comply with the terms of the interim injunction, unless their attention is drawn to a specific act, when they take steps to comply with the order in that particular instance only.

It could be expected that the defendants would have kept a careful record of the packets complained of that they withdrew. Mr. Haria said he did not; the packets complained of were still in shops as late as January of this year. It seems that it would serve no purpose to order an account and there being sufficient material before me on which to assess damages I should do so. Accepting Mr. Eckhart's figures and taking into consideration the circumstances of the case and the conduct of the defendants I assess the damages at £2,125.

Judgment for the plaintiff against the defendant for £2,125 damages together with an injunction and costs.

For the plaintiff:

A. F. Morrison (instructed by Archer & Wilcock, Nairobi)

For the defendant:

J. J. Patel

Case v Ruguru
[1970] 1 EA 55 (HCK)

Division: High Court of Kenya at Nairobi
Date of judgment: 12 June 1969
Case Number: 652/1968 (129/69)
Before: Miller J
Sourced by: LawAfrica

[1] Customary Law – Marriage – European male and African female – Embu custom – Payment of half the sum agreed as bride-price in order to complete the marriage.

[2] Customary Law – Marriage – Embu Custom – Ceremony of “Ngurario” – Failure to carry out all steps necessary to contracting a valid marriage.

[3] Matrimonial Causes – Marriage – European male and African female – Co-habitation proved – Customary marriage ceremony not complete – Whether any rights acquired by female defendant to occupy plaintiff’s house.

[4] Land Law – Licence – Defendant allowed to occupy plaintiff’s house – Defendant claiming right to continue occupation by virtue of customary law marriage with plaintiff – Embu customary ceremony not complete.

Editor’s Summary

The plaintiff, the owner of a house in Nairobi, claimed an order declaring that the defendant had no right to occupy the house. The defendant alleged that she and the plaintiff were married under Embu or Kikuyu custom and that she was residing on the premises as the lawful wife of the plaintiff. The plaintiff, a European, gave evidence to the effect that he was married in February 1956 to a European widow and that the marriage still subsisted. He admitted living with the defendant in the house and paying about Shs. 3,000/- to the defendant’s family as part of a dowry. The defendant’s father alleged that he received Shs. 2,000/- towards an agreed total of Shs. 9,200/- as dowry and gave evidence to the effect that in Embu custom the marriage ceremony between an Embu woman and a man of another tribe or race has not been completed until half of the dowry is paid and the ceremony of “Ngurario”, the slaughtering of a ram, performed. He admitted that the ceremony of “Ngurario” had not been performed and that less than half of the dowry had been paid.

Held –

- (i) the plaintiff was the sole registered owner of the suit premises;
- (ii) the plaintiff and the defendant were not legally married;

- (iii) the defendant could not therefore base a claim of occupancy on the ground of being the plaintiff's wife;
 - (iv) the plaintiff was entitled to terminate the permission of the defendant to occupy the suit premises.
- Judgment for the plaintiff for an injunction and costs.

No cases referred to in judgment.

Judgment

Miller J: In this suit the plaintiff Charles Arthur Case, a European working and residing in Nairobi, sues Doris Ruguru, an African female, seeking a declaration that the said Doris Ruguru has no right to use the plaintiff's house, No. 78 Sclater's Road, Nairobi and an injunction restraining her from using the said premises, and damages.

The relevant portions of the plaint are as follows:

- "3. The plaintiff is the owner and was at all material times in possession

of the premises known as House No. 78 situate at Sclater's Road, Nairobi.

4. During the year 1962 the plaintiff engaged the defendant as a house girl and granted to the defendant a licence to reside in the plaintiff's said premises during the term of her employment.
5. On or about September 1967 the plaintiff terminated the defendant's service and paid the defendant the sum of Shs. 5,035/- being the amount claimed by the defendant in full and final settlement of the defendant's claim towards the plaintiff and thereby determined the said licence as from that date.
6. Despite repeated letters from the plaintiff's Advocates requesting the defendant to vacate the aforesaid premises the defendant wrongfully continues to reside therein."

By document of title tendered as well as can be gathered from the evidence there is no doubt that the plaintiff is the sole registered owner of the premises at No. 78 Sclater's Road, Nairobi. Further the plaintiff tendered Exhibit 3 a writing dated 1.9.67 as follows:

"1.9.67.

I have received from Mr. C. Case Shs. 5,035/- in cash being full payment of my services and I have no further claim from him for anything.

Doris Ruguru."

In her defence the defendant denied being employed as a house girl by the plaintiff and having been granted licence to reside on the premises and she specifically alleged as follows:

"The defendant states that she the defendant was married to the plaintiff under the Embu or Kikuyu customary law in February 1963 and she had been residing in the said premises ever since the date of marriage till to date as the lawful wife of plaintiff and referring to the said home as her matrimonial home. Defendant further states that plaintiff paid Shs. 2,000/- cash at the time of the said marriage as the bride price to the father of the defendant and avers that the said customary marriage between the plaintiff and the defendant has never been dissolved.

5. Defendant denies to have received the said sum of Shs. 5,035/- or any other sum `on account of full and final settlement of defendant's claim against the plaintiff as stated in the plaint but admits to have received Shs. 5,035/- as a balance of the bride price on behalf of her father."

The defendant went on to pray for dismissal of plaintiff's suit and such relief as the court may deem it fit to grant.

It is appropriate to point out immediately that in support of his oral testimony the plaintiff tendered his marriage certificate to show that on 18 February 1956 at the Registrar's Office, Nairobi he was married to Sophie Ellen Woodruff, a widow, and he claimed that the said marriage has not been dissolved.

Very briefly, the plaintiff's evidence was to the effect that he engaged the defendant as a children's help to his two daughters in April 1962. The daughters were then aged 12 and 11 and for purposes of defendant's employment she was permitted to live in the main house with two of her own girl children while his two boy children lived in the servants' quarters. Mrs. Ellen Case left the house in December 1962 and she lived outside Kenya up to the time of the trial of the suit while the plaintiff's two daughters left the house around September 1966, and he himself on 1 September 1967 on the advice of the police in order to avoid trouble. He first met the defendant as they worked together at Hughes

Ltd., Nairobi and invited her to work as stated above at Shs. 170/- per month. In addition he maintained her children and paid for their education but she quarrelled with him all the time and was cruel to him so he asked her to leave on 1 September 1967. Defendant agreed to leave if given some money and he gave her Shs. 5,035/- against her signature in Exhibit 3 and a further Shs. 150/- for transport. This done, the defendant refused to leave the house so he left and was still living in a rented house at Bernard Estate. On 12 December 1967 defendant broke into this rented house and gave the plaintiff a thorough beating and damaged property to the value of Shs. 5,000/-, and in the result she pleaded guilty to offences in court after being arrested and charged by the police. The plaintiff said that there was no reason why the defendant should call herself his wife as they were not legally married although they were living together in the same house and that he "paid" about 3,000/- to the defendant's family because they were in financial difficulties and he wanted to help. This money he said was part of a dowry but it was never legalised and he is not married under customary law. Without unnecessary reproduction of the plaintiff's evidence under cross-examination by the defendant the court does not hesitate to conclude that the plaintiff and defendant did for some time between April 1962 and September 1967 live together in the plaintiff's house in circumstances which could reasonably found a strong presumption on the part of the defendant that she was, in fact as well as in law, married to the plaintiff. Her evidence in chief is as follows:

"I work with the City Council of Nairobi. I am staying in the house of my husband at Sclater's Road. I have received notice from my husband's lawyer asking me to leave my husband's house. I know that he married me from my father. He has never divorced me. I cannot leave the house unless he calls my father. Since plaintiff has paid dowry I cannot leave the house. In our customary law when someone is married, when she is taken by her husband and he shows her the house and land all that house and land become her property. This is the custom of Embu people. The woman waits for the husband to have the children and everything is handed to her. When plaintiff did all these things I knew I became his wife and I could go nowhere else. He told me to leave the work with the company. I do not know where to go. If I go home my father will ask me – where are you going? Why are you here when I handed you to your husband. I cannot leave that house unless he takes me back to my father. I know he is my husband because if he dies I can go and get his body and have it buried. I was employed by City Council in 1964. I could not work for City Council and then work for someone else. I am not going to leave that house for it is the one he showed me and put me inside. Plaintiff is giving me food, he is paying for water; we do not use electricity."

The defendant thus basing her right to occupy the plaintiff's house even to the exclusion of the plaintiff himself despite the strained relationship existing between the parties, it becomes necessary to examine the nature and consequences of the alleged marriage by Embu customary law. The defendant called her father Joseph Mamotere as her chief witness in support of her claim to legal marital status with the plaintiff. He said that on 6 February 1963 the defendant went to him at Embu and informed him that a white man wanted to marry her, they were working together and were lovers. He then got a friend one Efantus Ireri and with the defendant they proceeded to the defendant's house at Jericho. On 8 February 1963 the plaintiff took himself and friend by motor car to plaintiff's house where the plaintiff produced two cases of beer. The three men drank some of the beer while the defendant prepared a meal at plaintiff's request. This witness's evidence in chief continued as follows:

"I told him that at Embu we take sugar cane beer. He asked where that

kind can be got at Nairobi and we must take what we had there. After taking the first glass he said, 'I have called you here because I am your daughter's lover, we work together and she is a good lady and I want you to show me how marriage takes place at Embu.' I asked him if he would be able to marry a lady from Embu. He said 'Yes.' I told him 25 cows and 25 goats. I asked him for 2 he-goats and 2 rams and 3 tins of honey. I then asked him beer for the clan and sugar to make this beer. I asked him for overcoat and 2 blankets, a pair of gum boots and 1 suit. He went for a book in which he said he would write the money as cows and goats he could not get. He wrote all the things in the book to a total amount of Shs. 9,300/-. Plaintiff then produced Shs. 2,000/- in 20 notes of Shs. 100/- each. I received this and he told me to wait for Shs. 7,300/- until he sold some land and then he would come to me at Embu with the defendant and the balance. I have not got it up to now. I handed my daughter to him; she would be his wife and I told him to write to me if there was any misunderstanding. Now I am in court I know not why. I told him that at Embu in the case of misunderstanding the husband gets a man to take the wife back to the father. I have heard of no quarrel between them since February 1963. Now I am worried to hear that he is putting my daughter out of the house. Plaintiff took the defendant from the house she was given by the City Council at Jericho. If he does not want my daughter he must tell me and then I will show him according to Embu customary law. That is, the husband takes oath and he gives cows and goats to the father and some are eaten by elders of the clan. He was to bring the Shs. 2,000/- and the ram to be slaughtered. He said that he could not buy a goat in Nairobi, his English friends would know that he was going to get married and he would be in trouble. He told me to buy a he-goat with Shs. 300/-."

In support of his evidence in chief the witness produced his own diary which clearly showed on a page thereof that the items and cost of dowry provisions were in fact agreed and recorded on 8 February 1963. The record was duly witnessed and plaintiff made a personal note against the total of Shs. 9,300/-, i.e. "Cash Paid Shs. 2,000/- C. Case". It is however unfortunate that although expressing grave surprise at the very suggestion that the defendant was not married to the plaintiff and his personal bewilderment at being in court, on the testing of this issue he forthwith proceeded to cast grave doubt on the very rules of Embu customary law which he contended bound the plaintiff and defendant as legally married. This was amply demonstrated in his answers under cross-examination viz.:

"I have another daughter who is younger than the defendant. She is married. I did not receive dowry with respect to her. I have not asked for the dowry. That husband's marriage is not the same as that of the plaintiff in this case because there has never been marriage between English people and Embu people. The dowry I asked of the plaintiff was not in accordance with Embu custom. The second daughter is married but not really married because I have not got the dowry. In Embu customary law a marriage is complete if the man pays half of the dowry. If the girl does not like the man, before any dowry is paid he or she can go their own way; so also if as much as half the dowry has not been paid but the two parties can go on living together if they are in love and not fighting. I knew that plaintiff and defendant fought and went to the police. People coming to Nairobi told me this in March 1968. The plaintiff has not paid half the dowry and the ceremony 'Ngurario' has not been performed. The ram is to be slaughtered before the elders of the clan so that they could bless

the union. That did not take place in the present case. If an Embu woman is to marry a man of another tribe the marriage must be according to her custom.”

On the face of it the amount of dowry demanded of the plaintiff appears excessive and a departure from the custom claimed in this case; but it is common knowledge that in Kikuyu customary marriages in the Embu district there has been much insistence on freedom of negotiation in this behalf depending upon the circumstances of the particular case. The defendant’s father made it clear that in the case of plaintiff and defendant the marriage was a unique one calling for negotiation and worthy of Shs. 9,300/-. It should be noted that the plaintiff signified his consent to this amount of dowry in writing. I therefore see no valid reason to question the agreement of the parties as to quantum of consideration. The witness also gave the impression that payment or non-payment of exactly one-half of the dowry leads to set consequences. Be that as it may, the court is particularly concerned with the witness’s own admission that the ceremony “Ngurario” was never performed. It is enough to say that, as there can be no valid marriage under Kikuyu customary law if among other things this vital ceremony has not been performed, the court finds that on the evidence a marriage between the plaintiff and defendant under the custom never took place. If I correctly understand the plaintiff’s contention and his evidence he is saying that, being married, he could not legally marry the defendant; and at all events, even although he concedes that he took certain steps consistent with preparation for the contracting of marriage under the customary law of the defendant, these are of no effect in support of the defendant’s claims and the position would have been the same even if he had carried out all the necessary steps for contracting a valid Kikuyu customary marriage with the defendant. While this might rightly be the case I cannot resist addressing my mind to all the evidence adduced in this case in the interest of the rights of those individuals who for a long time to come may be constrained to seek remedy for alleged wrongs primarily with reference to customary law. It is settled law that marriages properly contracted under customary law are of legal effect and matters appertaining to promises and preparation for such marriages are in my view cognisable by the courts depending upon the circumstances. In the present case the defendant, when pressed under cross-examination in order to establish that she knew that the plaintiff was already married when she lived with him at his house at Sclater’s Road, Nairobi, said:

“I knew that plaintiff had two wives before me. He showed me a divorce document of the second wife. I did not read the name as plaintiff told me he divorced her. He said the first wife was from Uganda and he divorced her. Plaintiff did not tell me if he was married by law or by custom. I met a woman and two children when I went to plaintiff’s house in April 1962. I do not know the woman’s name. I do not know when she left. She stayed for more than six months. She was not speaking, she was abnormal. She would refuse to eat and did not speak. I do not know how she went to that house but I used to see Welfare Officers visit the house. I was not interested as she was not staying in the same room with my husband. The children used to call her ‘Auntie’. She would refuse to reply. Plaintiff said she was of the tribe of the former wife with whom he had fought. I do not know if the woman was English or Seychellese; all white people look alike.”

It therefore appeared to the court that at a time prior to and including the period of the plaintiff’s embarking upon his admitted acts which are in no way inconsistent with some of the valid steps towards the contracting of a Kikuyu customary marriage with the defendant, she might well have been kept in

ignorance of the plaintiff's marital status, a matter which was fully within his knowledge. In such circumstances an action for breach of contract of marriage may certainly lie. The defendant contended that she was "cheated" by the plaintiff when she signed Exhibit 3 as he informed her that he was going on safari and he was leaving some money with her. It is somewhat significant that despite the beating the plaintiff received at the hands of the defendant on 31 December 1967 and with his plaint in this suit filed on 15 May 1968 he admitted going to the house at No. 78 Sclater's Road on 14 September 1968 and spending the night there, sharing a bed with the defendant. He, however, rejected her vehement suggestion in cross-examination that during that night he told her that he would go to collect his effects and return to her. Returning to the pleadings and issues expressly before the court I find on the evidence: (1) the plaintiff is in fact the sole registered owner of the premises at No. 78 Sclater's Road, Nairobi; (2) the plaintiff and defendant are not legally married and the defendant cannot base a claim of occupancy of the said premises on the ground of being the plaintiff's lawful wife; and (3) the plaintiff is entitled to terminate permission to the defendant to occupy the said premises in the absence of any valid right to occupancy by the defendant. No such right having been shown the plaintiff is entitled to the relief claimed.

There will be judgment for the plaintiff limited to items (2) and (4) of the prayer, i.e. injunction and costs of the suit. The plaintiff's claim for damages is rejected as not having been proved.

Exhibits to be returned to owner. Leave to appeal granted.

Judgment for the plaintiff for an injunction and costs.

The defendant appeared in person.

For the plaintiff:

S. N. Waruhiu

Thiaka v Republic
[1970] 1 EA 60 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	4 June 1969
Case Number:	285/1969 (122/69)
Before:	Mendwa CJ and Farrell J
Sourced by:	LawAfrica

[1] *Appeal – Misdirection – Whether conviction can be upheld – Criminal Procedure Code (Cap. 75), s. 382 (K.).*

Editor's Summary

The appellant was convicted of rape, and in the course of his judgment the magistrate implied that the fact that the appellant had been implicated by his co-accused in his cautioned statement was evidence against the appellant provided that there was corroboration.

Held – that the misdirection had caused no injustice as the evidence was so strong that a conviction was inevitable.

Appeal dismissed.

No cases referred to in judgment.

Judgment

The following judgment of the Court was read by **Mwendwa CJ**: The appellant was convicted of rape contrary to s. 140 of the Penal Code and sentenced to five years' imprisonment and 24 strokes. He appealed against his conviction and sentence. At the hearing we dismissed the appeal and now give our reasons.

The prosecution case was that on the evening in question the complainant and her husband alighted from a bus and proceeded to walk towards their home, accompanied by the appellant, his co-accused and another man. While they were on their way the appellant told the complainant's husband that he and his companions wished to have intercourse with the complainant. The complainant's husband not unnaturally protested and thereupon there was a fight between the husband and the appellant while the co-accused dragged the complainant into a nearby bush. The husband escaped from the appellant and ran to summon assistance. In the meantime the appellant followed his co-accused into the bush, and they both had intercourse with the complainant, first the appellant and then the co-accused. When the appellant had completed the offence he left, but a police party came upon the scene and arrested the co-accused while he was still adjusting his dress.

We should have regarded this as a clear case against the appellant if it had not been for a serious misdirection in the judgment, which contains the following passage:

“As far as accused No. 2 is concerned, there is ample corroboration to complainant's evidence; he was actually arrested at the scene. He had implicated accused No. 1 in his cautioned statement but that cannot be accepted without further independent corroborative evidence and that is supplied by the evidence of the complainant's husband who had fought with him.”

In this passage the magistrate appears to imply that when one accused implicates another in his cautioned statement, that is evidence against the latter provided that it is corroborated. This is manifestly wrong. A cautioned statement is not evidence against anyone other than the maker of the statement. The only exception to this rule is to be found in s. 32 of the Evidence Act, but that exception relates only to confessions, as defined in the section, and the statement of the co-accused in this case is not a confession.

We were at first inclined to think that in view of this misdirection the conviction ought to be quashed, but we came to the conclusion that, even if what was said by the second accused is ignored, the evidence against the appellant was so strong that a conviction was inevitable. We accordingly applied the provisions of s. 382 of the Criminal Procedure Code and dismissed the appeal against conviction.

The sentence was heavy but not in our view unreasonable and we dismissed the appeal against sentence also.

Appeal dismissed.

Appellant absent and unrepresented.

For the respondent:

Miss Barros D'Sa

[1970] 1 EA 62 (HCK)

Division: High Court of Kenya at Nairobi; Court of Appeal at Nairobi
Date of judgment: 2 July 1969; 14 November 1969
Case Number: 384/1969 (128/69); 76/1969 (158/69)
Before: Mwendwa CJ, Chanan Singh J; Sir Charles Newbold P, Duffus VP and Spry JA
Sourced by: LawAfrica

[1] *Evidence – Post – Service by post – When service presumed s. 3 (5) – Interpretation and General Provisions Act (Cap. 2) (K.).*

[2] *Evidence – Statement by accused – Production of at request of defence.*

[3] *Evidence – Statement by accused – Accused electing not to give evidence – Whether distinction can be drawn for different reasons for not giving evidence.*

[4] *Traffic – Dangerous driving – Notice of intended prosecution – Burden of proving non – compliance on accused – Traffic Act (Cap. 403), s. 50 (K.).*

[5] *Traffic – Dangerous driving – Notice of intended prosecution – When service is effected by post – Traffic Act (Cap. 403), s. 50 (K.); Interpretation and General Provisions Act (Cap. 2), s. 3 (5) (K.).*

Editor’s Summary

The appellant was the driver of a car which overturned killing a passenger in the car. The accident happened on 28 September 1969. A registered letter giving notice of intended prosecution to the appellant was posted to him at his work address on 11 October 1969. The appellant was away from work from 28 September 1969 until 21 October 1969. The appellant did not give evidence at his trial and his counsel stated that he had lost all memory of the happenings.

The appellant was convicted by the resident magistrate of causing death by dangerous driving and was sentenced to two and a half years’ imprisonment. He appealed to the High Court against conviction and sentence, and contended that the notice of intended prosecution had not been served on him within fourteen days of the commission of the offence, that dangerous driving had not been proved, and that the magistrate was wrong in commenting adversely on his failure to give evidence and that the prosecution had failed to produce the cautioned statement made to the police.

Held – in the High Court (Mwendwa, C.J., and Chanan Singh, J.):

- (i) the burden of proving non-compliance with the Traffic Act, s. 50, is on the accused, and the driver and the owner of the car should give evidence of non-service of the notice;
- (ii) “sent” in the Traffic Act, s. 50, means only “dispatched” and not “dispatched and received” (*Beer v. Davies*, [1958] 2 All E.R. 255 not followed);
- (iii) the magistrate did not warn himself that the accused has the legal right in all circumstances to remain silent, but that the failure caused no prejudice;

- (iv) a cautioned statement should always be produced by the prosecution if requested to so do by the defence;
- (v) after considering the evidence, that dangerous driving had been proved;
- (vi) the sentence was high, but not manifestly excessive.

Appeal dismissed.

Cases referred to in judgment:

- (1) *R. v. Richmond Recorder* (1858), 27 L.J.M.C. 197.
- (2) *Retail Dairy Co. Ltd. v. Clarke*, [1912] 2 K.B. 388.
- (3) *Hunter v. Wright*, [1938] 2 All E.R. 621.
- (4) *Stanley v. Thomas*, [1939] 2 All E.R. 636.
- (5) *R. v. Kipkering* (1949), 16 E.A.C.A. 135.
- (6) *Holt v. Dyson*, [1950] 2 All E.R. 840.
- (7) *Stewart v. Chapman*, [1951] 2 All E.R. 613.
- (8) *Sandland v. Neale*, [1955] 3 All E.R. 571.
- (9) *R. v. Appeal Committee of County of London Quarter Sessions ex. p. Rossi*, [1956] 1 All E.R. 670.
- (10) *Beer v. Davies*, [1958] 2 All E.R. 255.
- (11) *R. v. Davies* (1959), 43 Cr. App. R. 215.
- (12) *Sanders v. Scott*, [1961] 2 All E.R. 403.
- (13) *Hosier v. Goddall*, [1962] 1 All E.R. 30.
- (14) *Vallabhji v. National & Grindlays Bank Ltd.*, [1964] E.A. 442.
- (15) *National & Grindlays Bank Ltd. v. Vallabhji*, [1966] E.A. 186.
- (16) *R. v. Hoare*, [1966] 1 W.L.R. 762.
- (17) *Patel v. Republic*, [1968] E.A. 97.
- (18) *D'Silva v. Rahimtulla*, [1968] E.A. 287.

Judgment

The following judgment of the Court was read by **Mwendwa CJ**: The appellant in this case was charged with causing death by dangerous driving contrary to s. 46 of the Traffic Act and was convicted and sentenced to two and a half years' imprisonment. He now appeals on several grounds to this Court against both conviction and sentence. The first ground is that a notice of intention to prosecute given under s. 50 of the Act was invalid in that it was received by him after the period of 14 days stipulated in the section had expired. He contends, for this reason, that the prosecution was not sustainable. Section 50 (omitting words not relevant to issues before us) says that a person "shall not be convicted unless –

- (a) he was warned at the time the offence was committed;
- (b) within fourteen days of the commission of the offence a summons for the offence was served on him;
or
- (c) within the said fourteen days a notice of the intended prosecution . . . was served on or sent by registered post to him or to the person registered as the owner of the vehicle at the time of the

commission of the offence.”

This is subject to a proviso the relevant part of which reads:

“(ii) the requirement of this section shall in every case be deemed to have been complied with unless and until the contrary is proved.”

It is clear from this that the burden of proving the invalidity of the notice is on the accused. The magistrate was, therefore, wrong in calling upon the prosecution to prove the validity of it. The proper procedure would have been for him to allow the accused to produce evidence in support of his contention. The prosecution would have been entitled to rebut any evidence given by the accused.

It should be observed that under the section in question the notice can be

given to the person who is charged “or to the person registered as the owner of the vehicle”. It is for the defence to show that a valid notice was not given either to the driver or to the registered owner of the vehicle. As is stated by Lord Parker, C.J., in *Sanders v. Scott*, [1961] 2 All E.R. 403, at p. 405:

“The proper way of doing that is for the driver to give evidence that no notice was served on him and to call the registered owner in turn to show that equally no notice had been served on him.”

There is nothing in the record of this case to indicate whether the appellant was the driver or the owner of the vehicle or whether he was the owner-driver. The accused certainly did not give evidence and no other person calling himself the owner of the vehicle gave evidence. The prosecution did not suggest a notice had been sent to a person other than the appellant and we will not pursue this aspect of the matter but will examine the arguments placed before us by the appellant’s advocate. It is common ground that no verbal warning of prosecution was given to the appellant at the time of the offence; nor was any summons served on him within 14 days. Therefore, clauses (a) and (b) of the section did not come into operation. Clause (c) requires that within fourteen days of the offence a notice shall be “served on or sent by registered post to him” (i.e. to the person charged). The accident in this case took place on 28 September 1968. Under s. 57 (a) of the Interpretation and General Provisions Act (Cap. 2), the 28 September is to be excluded in calculating the period of 14 days. The last day of the period would be 12 October. Thus, a notice would be valid if “sent” to the appellant on or before that day. The rule in England is the same: see *Stewart v. Chapman*, [1951] 2 All E.R. 613.

The appellant’s contention is that the word “served” means “personally served”, and that the word “sent” means not just sent but “sent and received”. In the present case, a notice was personally served on the appellant on 14 October 1968. That was clearly out of time and would not sustain a prosecution. But another notice had been made out by the police on 10 October and had been dispatched by registered post on 11 October. A registered letter advice was issued by the post office on 12 October. The only witness on behalf of the appellant on this issue was Mr. Alaudin Mawani who told the trial court that he was employed by the East African Airways (by whom the appellant also is employed) as Senior Operations Officer. He stated that his records showed that the appellant went sick on 28 September 1968 and reported for duty on 21 October 1968 and was put on duty on 22 October 1968. This witness also stated:

“Any mail received after 1 p.m. on Friday would be kept in my office till Monday morning to be sorted out and delivered. We do not work on Saturdays. This card addressed to the accused is dated 12th October 1968 and would have been delivered to the accused on the following Monday morning, i.e. on 14th October 1968.”

Quite apart from the correctness or otherwise of the appellant’s interpretation of the word “sent”, it should be noticed that Mr. Mawani did not say at what time and on what date the registered letter in fact reached the appellant. He merely suggested the notice posted on 11 October probably did not reach the appellant before 14 October (by which date the period of 14 days would have expired).

The magistrate rejected the accused’s submission because the prosecution had proved that the notice had been “sent” in time; but, in our opinion, he could have rejected it on the ground that the accused had failed to prove that “the requirement of this section” was not “complied with”. To succeed, it would be necessary for the accused to prove that the notice was not “sent” –

whatever the meaning of that word – within 14 days. By producing Mr. Mawani as his only witness he was trying to create a reasonable doubt in the mind of the magistrate as to the period within which the notice had been sent, as though the burden of proof had been on the prosecution.

We turn now to the appellant's contention that we must give to the word "sent" in the context of s. 50 a meaning different from its dictionary or natural meaning.

It is well-known that s. 50 of our Traffic Act was a reproduction of s. 21 of the 1930 Road Traffic Act of the English Parliament. The English section came up for consideration, for the first time it appears, in *Stanley v. Thomas*, [1939] 2 All E.R. 636. There, it was decided by the King's Bench Division (Lord Hewart, L.C.J., Humphreys and Lewis, JJ.) unanimously that the words "sent to him" means only "sent to him" and not "sent to him and received by him". This view held the ground for many years although courts started giving the words used a liberal interpretation. For example, in *Holt v. Dyson*, [1950] 2 All E.R. 840 the King's Bench Division consisting of Lord Goddard, C.J., Byrne and Ormerod, JJ., decided that the notice did not comply with the requirements of law if it had been sent to the permanent address of the accused when the police knew that he was in hospital and would not be returning home for some time. With respect, this decision was correct in any case. A notice in these circumstances could not be said to have been sent "to him" because the police knew it would not get to him.

The facts in *Sandland v. Neale*, [1955] 3 All E.R. 571 were slightly different. The person to be charged was lying in hospital and was unable to appreciate the notice or act on it. It was held by the Queen's Bench Division (Lord Goddard, C.J., Ormerod and Barry, JJ.) that a notice of intended prosecution sent by pre-paid registered post to the defendant at his home address complied with the requirements of s. 21.

The three English decisions so far can, we think, be summarized thus: a notice would meet the requirements of law if sent to the offender at the place where it is most likely to come to his attention or (if he be too ill to attend to it) to the attention of his family.

Then came the case of *R. v. Appeal Committee of County of London Quarter Sessions Ex parte Rossi*, [1956] 1 All E.R. 670, on which the appellant relies for his interpretation of the word "sent". This was an affiliation case. M. brought proceedings against Rossi. She failed to prove that Rossi had fathered her child and the proceedings were dismissed. She took the matter to the appeal committee. It was now the duty of the clerk of the peace to "give notice" of the date on which the appeal was to be heard. The law provided that the hearing notice could be "sent by post in a registered letter". A registered letter was sent to Rossi but was returned by the postman who did not find Rossi at home. The appeal was heard in Rossi's absence and decided against him, he being adjudged the putative father of the child and ordered to pay £1 a week. Rossi applied to the Divisional Court for an order for mandamus and certiorari to bring up the order of quarter sessions to be quashed. The application was refused because, as Lord Goddard put it, "There is no ground for saying that there has been any failure to observe the procedure which is laid down by law". Rossi appealed to the Court of Appeal against this refusal. The appeal was allowed, it being held that a notice of hearing had not been "given" to Rossi as required by law. Reference was made in all three judgments to s. 26 of the Interpretation Act 1889 – Kenya law has no corresponding provision – which says that if an Act requires a document to be served by post (whether the expression used is "serve", "give" or "send") then it shall be deemed to have been served "at the time at which the letter would be delivered".

in the ordinary course of post” – “unless the contrary is proved”. The contrary was proved in the *Rossi* case because the letter had come back. Therefore, the notice could not be said to have been served.

Lord Denning also considered the matter from first principles. The notice to Rossi was “an originating process analogous to a writ of summons” (p. 674) and unless it was served, “quarter sessions ought not to have proceeded with the case, because there was no proper service” (p. 675). Instead of applying for certiorari, Rossi could apply to quarter sessions to set aside the order made in his absence and to rehear the appeal.

Lord Parker summed up the position thus:

“I think that the obligation expressed by the words ‘shall in due course give notice’ means in its context ‘shall cause notice to be received in a reasonable time to enable the party concerned to prepare for and attend the hearing’” (p. 682).

With respect, we agree with this conclusion, as indeed with the view of Lord Denning. What was involved in the *Rossi* case was the service of originating process. Unless service was effected, the court could not proceed with the case. To decide a case without giving the defendant an opportunity to be heard would be an infringement of the principles of natural justice.

Lord Parker says (p. 681) that the second part of s. 26 of the English Interpretation Act refers to “delivery” and would therefore come into play where the document is required to be received by a certain time. “Whether that time relates to receipt or merely to dispatch of the notice” would depend on the context. Here, Lord Parker quotes from the judgment of Ridley, J., in *Retail Dairy Co. Ltd. v. Clarke*, [1912] 2 K.B. 388, at p. 393:

“Sending in the ordinary sense is merely dispatching. The word ‘send’ may, however, be used in connection with other words so as to imply that by ‘sending’ is meant such a sending as that the thing may by the time specified pass into the hands of the person to whom it was sent.”

Lord Parker gives three illustrations of the variation of meaning with the context:

- (1) It was held in the *Retail Dairy Co.* case that the word “send” did not in that context require the extended meaning.
- (2) “Again in the cases under the Road Traffic Act 1930, s. 21, which requires that within fourteen days a notice of intended prosecution is to be ‘served on or sent by registered post’ to the offender, it has been held again that ‘sent’ merely means dispatched: cf. *Stanley v. Thomas*, [1939] 2 All E.R. 636, *Holt v. Dyson*, [1950] 2 All E.R. 840, and *Sandland v. Neale*, [1955] 3 All E.R. 571.”
- (3) “On the other hand, in *R. v. Richmond Recorder* (1858), 27 L.J.M.C. 197, the court construed ‘sent’ in its context as meaning ‘delivered’.”

Then the judge continues:

“Turning again to s. 3 (1) of the Act of 1933, the clerk of the peace is to ‘give notice’ which contemplates not merely a written notice but an oral notice. . . . I think it is reasonably clear that the notice is to be delivered, and delivered in time to enable the party concerned to prepare for and attend the hearing. Much reliance is, however, placed on the concluding sentence which provides for the notice being ‘sent’. That, however, is only providing a further method by which the clerk of the peace may ‘give notice’ and cannot alter the nature of the obligation itself.”

This is the effect of the three judgments in the *Rossi* case which we have analysed as dispassionately as we could. In all the three, there is only one reference to the notice of intended prosecution and we have reproduced it verbatim above. All that Lord Parker there says is that the word “sent” has been interpreted as dispatched. He does not even suggest the context requires a different interpretation.

In the law with which the *Rossi* case was concerned, the meaning of “sent” was controlled by the expression “shall in due course give notice”.

The next case in the line was *Beer v. Davies*, [1958] 2 All E.R. 255. This was a traffic case. The notice of intended prosecution was sent to the offender at his proper address by registered post but he had proceeded on holiday by the time notice arrived and it was returned to the police undelivered more than 14 days after the collision. The information filed was dismissed by the metropolitan magistrate because s. 21 of the Road Traffic Act had not been complied with. An appeal made to the Queen’s Bench was also dismissed, it being held that “the notice of intended prosecution had not been delivered”.

Lord Goddard, C.J., stated:

“The question is whether this notice has been served on the respondent, and it can be served either by serving it on him – that is personal service – or serving it by registered post. . . . The Court of Appeal in *R. v. London Quarter Sessions, Ex parte Rossi*, [1956] 1 All E.R. 670 have decided that where a notice is to be served by registered post, though it is prima facie enough to prove that it was correctly directed, stamped and posted, yet if it can be shown that the notice was never delivered, there has not been service and section 26 of the Interpretation Act 1889, does not assist” (p. 257).

Hilbery, J., stated:

“For the reasons given by my Lord, I am of opinion that we cannot hold that in this there was a sufficient giving of the notice merely by sending the notice by registered post to the defendant at the address which was his address. We are clearly precluded, it seems to me, by the decision of the Court of Appeal in *R. v. London Quarter Sessions, Ex parte Rossi*”.

Donovan, J., the third member of the Court, agreed with the two judgments delivered.

Perhaps we should point out that the *Rossi* case – we have read it over and over again – decided only that

- (1) to “give notice” to a person meant delivering the notice to that person. If the notice was sent by registered post, then the notice could not be said to be “given” until it was received by the addressee;
- (2) whether “sent” meant merely dispatched or “received” by the other party depended on the context; Lord Parker noted that in three decided cases under s. 21 of the Road Traffic Act the court had come to the conclusion that the word “sent” meant dispatched.

We wish not to differ from such eminent judges as composed the court but, with the greatest respect to them, we fail to see how the *Rossi* case could be taken to lay down that “sending” without more meant delivering or receiving. Lord Parker had there quoted with approval the view of Ridley, J., in the *Retail Dairy Co.* case that the word “send” may if “used in connection with other words” be interpreted as receive or deliver. The other words in the *Rossi* case were to “give notice” and registered post was only a means of giving notice.

Again, Lord Goddard in the *Beer* case poses the question “whether this notice has been served on the respondent”. With respect, that was not the question that arose. The question was whether the notice had been “sent by registered post”. The law allowed the notice to be either “served” or “sent by registered post”.

It is possible that the judges regarded the words “served” and “sent” as synonyms, but in our view there is no warrant for that. What the law requires is not “service” but either “service” or “sending”. If the intention of the legislature had been to make “service” obligatory, then it would have stated that the notice must be served within 14 days and that service may be effected by registered post. This was the position under the law that came up for consideration in the *Rossi* case. “Service” would then have controlled the meaning of “sending by registered post”.

For these reasons, we do not propose to follow the decision in the *Beer* case.

The last case quoted to us for the appellant is *Hosier v. Goddall*, [1962] 1 All E.R. 30. The offender was lying ill in hospital and the notice of intended prosecution was sent to him by registered post at his home address and was received by his wife. She opened the letter, read it, but did not show it to her husband lest he should worry unduly. Lord Parker, C.J., from whose judgment in the *Rossi* case we have quoted extensively, stated:

“Since *Ex parte Rossi* . . . it has been necessary to show that the notice was received whether by the actual addressee or by his agent.”

It was held that the wife received the notice as agent and that, therefore, the requirements of law had been complied with by the police.

With respect, we agree with the conclusion but not with the reason given for it.

We realise that our s. 50 is a reproduction of s. 21 of the English Road Traffic Act. We would normally follow English decisions on the section but in the present case we are satisfied that the latest English decisions depart from the actual wording of the law without justification. This departure may in some measure be due to s. 26 of the Interpretation Act 1889 which is not part of the law of Kenya. The principles of interpretation in the case of borrowed legislation were stated with clarity by Sir Charles Newbold in *Vallabhji v. National and Grindlays Bank*, [1964] E.A. 442. He stated in particular that foreign decisions are “not absolutely binding” and that a decision “may be disregarded if in the view of the East African court the decision is clearly wrong” (p. 446). This statement of the position was approved by the Privy Council in the same case, [1966] E.A. 186, at p. 195.

Sir Clement de Lestang summarised the position thus in *D’Silva v. Rahimtulla*, [1968] E.A. 287, at p. 291:

“. . . as the Judicial Committee of the Privy Council said in *National and Grindlays Bank Ltd. v. Dharamshi Vallabhji and Others*, [1966] E.A. 186, it is unsafe to assume that when an Act is modelled on another Act the legislature must necessarily be supposed to have intended to import into that Act the case-law of the country from which it is derived. I do not think that this method of construction should be used in the present case but rather that the section should be interpreted, as statutes usually are, free from outside influence.”

Whatever might be said about cases decided in England before s. 50 was introduced into our law, the cases now in question were all decided later and cannot

be said to have been imported into our law. We consider that we should interpret the words in s. 50 according to their natural meaning and “free from outside influence”. This is what we have tried to do.

Perhaps we should now summarise our views. The notice of intended prosecution under s. 50 of the Traffic Act has to be “sent” by registered post within 14 days of the accident. This is only one of the four alternative ways of informing the offender of the intention of the police. The other three are these:

- (1) warning at the time of offence – clause (a);
- (2) service of summons within 14 days – clause (b);
- (3) “service” of notice within 14 days – clause (c).

The law draws a clear distinction in clause (c) between “service” of the notice and the “sending” of the notice by registered post. If “service” can be effected, it must be done within 14 days. If “service” is not practicable then the notice must within the same period be “sent by registered post”. To insist that the notice sent by registered post must also be received by the offender within 14 days will impose on the prosecuting authorities a very uncertain burden. “Receipt” of a registered letter is subject to factors which no sender can control. The post office can be negligent. The addressee can delay collection. He can go on holiday. He can stay away from his permanent address for a few days.

In the result, we reject the appellant’s argument under this head and hold that if by “sending” we mean “sending” in the dictionary sense the notice by registered post within 14 days the police did all that it was required to do. The burden of showing that the requirements of law were not complied with lay on the appellant and he has not discharged that burden.

There are two further legal submissions in the memorandum of appeal. Ground No. 7 challenges the magistrate’s conclusion that Mrs. Taylor, although a passenger in the appellant’s car, was a member of the “public” within s. 46 of the Traffic Act. The appellant has quite properly abandoned this ground and we say no more about it.

Ground No. 5 criticises the magistrate for commenting on the appellant’s failure to give evidence and for “drawing therefrom inferences adverse to the appellant”. The appellant concedes that s. 127 of the Evidence Act permits the court to comment on an accused’s failure to give evidence but he says that the court can go too far in this matter. We see that the magistrate refers to this matter four times in his judgment. Three are just brief references (pp. 4 and 9) but he deals with the matter at some length on pp. 14 and 15. We think the magistrate was entitled to say what he did say. A distinction may, we think, be drawn between an accused person who in a straightforward manner announces his intention not to say anything and another accused person who does not claim his legal right as a right but says that he is not giving evidence because he has lost all memory of the happenings. In the latter case, a court is entitled to express its feeling more strongly than in the former. Whether it is a case of one type or the other, however, the court must warn itself, and if it is sitting with assessors, warn the assessors that the accused has the legal right in all circumstances to maintain silence. See *R. v. Hoare*, [1966] 1 W.L.R. 762 and *R. v. Davies* (1959), 43 Cr. App. R. 215.

The magistrate did not give himself the necessary warning but we are satisfied that this caused no prejudice to the appellant.

To come now to the merits of the appeal. At around 6 p.m. on 28 September 1968 a Volkswagen car, KFZ 904, was proceeding from Nairobi towards Thika. As it passed the Githathuri river it suffered a puncture in one of its

wheels. It skidded and landed in a ditch facing Nairobi on the right side of the road. The road on which the car was travelling was the right hand side road of a double carriage-way.

Soon thereafter a Ford car was travelling in the same direction on the same road. It went over to the extreme right of the road, hit the Volkswagen and grazed the stone wall on the right side of the road and ended up facing Nairobi 128 feet away from the Volkswagen towards Thika. This was the car driven by the accused. If the Ford also had suffered a puncture before the impact it could perhaps be argued that the two cars behaved similarly under more or less the same physical conditions and that the Ford's behaviour was due to a pure accident.

But the Senior Vehicle Inspector of the Government, Mr. William Gateru, stated clearly that the condition of the Ford's tyres indicated "that there was no puncture prior to the accident impact". There is no evidence which contradicts this opinion.

The particulars of charge allege driving by the appellant "at a speed and in a manner which was dangerous to the public". The appellant complains that the magistrate has made no finding on speed. It is true that the magistrate did not say what the actual speed of the car was but, otherwise, his findings are clear. On the very first page of his judgment he says that the prosecution evidence "discloses" a high speed under conditions which he describes. On p. 11 the magistrate again says:

"From this evidence it is obviously indicated that the accused had been driving at an unsafe and dangerous speed."

On the following page, he concludes thus:

"The said behaviour of the accused's car is indicative of its having been driven at a patently dangerous speed. I so find."

We are of the opinion that this finding is sufficient for the purpose of a charge of dangerous driving.

As regards the other element in the charge, the magistrate's finding is this:

"... in the absence of any explanation or any evidence showing that the accused had lost control for reasons beyond his control, I consider and hold that the accused had indeed at the material time driven his said vehicle in a dangerous manner."

That brings us to the next point made by the appellant. He says that the magistrate argued as though the *maxim res ipsa loquitur* applied in criminal cases. He complains in particular that the magistrate in quoting from the judgment in *Patel v. Republic*, [1968] E.A. 97, at p. 101 left out a few important sentences. We quote these sentences here to complete the quotation:

"If on the plain facts, as shown by the evidence, the act done by the driver is one which any reasonable person in the absence of any explanation would say is a dangerous piece of driving, then that driving is dangerous within the terms of section 47. But if by reason of some explanation given, whether that explanation be obtained from the evidence for the prosecution or for the defence, it is clear that for all practical purposes the driver at the time when the act was committed did not have control of the vehicle for reasons beyond his control, then that would be a defence to the charge. Now before the accident, as we have already said, the road was wet and the car was being driven in a normal way, at a reasonable speed; and then it suddenly skidded or swerved across the road in front of an oncoming vehicle."

We do not think this further quotation to which the appellant has drawn our attention changes the position in any way. The President is even here stressing the need for an explanation. In the case before the Court of Appeal, there was, it seems, evidence to show: (1) that the road was wet; (2) that the car was, before the accident, being driven in a normal way at a reasonable speed; and (3) that then the car skidded or swerved across the road in front of an oncoming vehicle. In the present case, there was no oncoming vehicle but there was a stationary vehicle on the right side of the road. There is no evidence at all that the appellant's car was, before the skid or swerve, being driven in a normal way at a reasonable speed. The evidence of the girl Anasthesia Njeri is that the car was coming at a high speed, was out of control and was zig-zagging.

In the present case, therefore, the need for an explanation was no less. How did the appellant lose control? Why did the skid or swerve take place?

We are satisfied that the magistrate did not misdirect himself but correctly applied the law as explained by the Court of Appeal.

The appellant contends that the defence did offer explanations which the magistrate brushed aside as an "avalanche of speculations and theorisings". The magistrate also stated in the same strain that the appellant's expert witness, Mr. David Barber, had "not given any positive and decisive opinions" and again that "there is no positive opinion from Mr. Barber about it".

Mr. Barber offered three explanations for the behaviour of the appellant's car. These may now be examined:

- (1) "The Ford's 'main steering track rod' had failed. It was in a broken state. It is feasible to say that it had broken prior to the accident, and that it was a true and latent defect. If this possibility was correct, it might well have caused loss of control on part of the driver. It could have been possible to check whether it was in fact a latent defect. I couldn't as that vehicle was in police custody. Such defects are not infrequent in this country." He stated later: "If the steering had failed prior to the accident, the direction of the car would be unpredictable." In cross-examination, he stated: "The track rods break due to fatigue and abnormal strain. Yes, that track rod of the Falcon could have been broken on impact."

The Government expert, Mr. William Gateru, had said this in cross-examination earlier: "The track rod end of that Ford KHF 231 was damaged by accident impact. There was fresh damage on it. I cannot say on what part of that Ford it had received the initial impact. I cannot say whether that track rod had hit an object before the actual collision." Apart from this suggestion in cross-examination there is no evidence that the track rod hit any other object.

- (2) The appellant faced an emergency when he saw the Volkswagen in front. A driver in that situation would swerve to his left and would subconsciously brake. On a slippery patch like that, even a gentle braking action would bring about a skid.

The tarmac portion of the road was 22 feet wide. Even if the Volkswagen was completely on the tarmac – no witness says this – nearly 17 feet of tarmac was available for the use of the appellant driving a car which was 5 feet 10 inches wide. We have no doubt the "emergency" or "the element of surprise" is completely imaginary.

Mr. Barber advances a further argument: "The general rule on that road is for the motorist to keep to his left unless he is overtaking. Driving in the offside lane of that dual carriageway is often indulged in. There was a possibility for that Falcon to have been driven in the offside lane after leaving the nearside

lane before or immediately upon reaching that area of the accident, and then being faced with the said element of surprise.”

All this is pure speculation without any foundation of fact.

- (3) Referring to the front offside tyre of the Ford: “One would not rule out the possibility of that tube having failed just prior to reaching that accident area. . . . The nozzle on the tyre breaking was indicative of a partially flat tyre and of the vehicle being braked with the tyre in that condition. This was a very practical possibility.”

Mr. Gateru’s opinion was that this tyre was “damaged” by the accident; its nozzle was broken and the tube itself was damaged . . . there was no puncture prior to the accident impact.

It is apparent that Mr. Barber gave thought to all the theoretical possibilities but did not form any concluded opinion. If he had been able to state firmly which cause or combination of causes, in his opinion, operated in this case, he might have helped the court to come to a different conclusion. As it is, he put before the court three hypotheses. Two had a scientific content and were contested by the Government expert who expressed definite opinions. The third was mere theorizing and could not carry conviction.

An “explanation” of the type envisaged by Sir Charles Newbold, P., in the *Patel* case is, in our opinion, lacking in this case. Only three persons saw what happened. The lady stranded near the Volkswagen saw the Ford coming and has given evidence unfavourable to the appellant. The passenger in the Ford is unfortunately no more. The driver of the Ford (i.e. the appellant) has sent word that he remembers nothing.

The appellant quotes in his support a civil case *Hunter v. Wright*, [1938] 2 All E.R. 621. There, a motor car travelling at 16 to 20 miles per hour developed a skid and injured a man walking on the pavement 13 to 20 feet away. It was held by the Court of Appeal that the driver was not negligent as the time and space at her disposal were insufficient to remedy the skid.

In the present case the speed of the car was estimated by Mr. Barber at 40 to 50 miles per hour. The car went over to its wrong side, hit the Volkswagen stationary there, and travelled another 128 feet before it stopped facing Nairobi.

We do not think there is any comparison between the two cases. The editorial note appended to the *Hunter* case is much too general to be of any help. The authorities discussed in the leading judgment are to the same effect as the view of our own Court of Appeal expressed in the *Patel* case.

The appellant also argues that the magistrate misdirected himself on the onus of proof. He says (relying on *R. v. Kipkering* (1949), 16 E.A.C.A. 135, at p. 136, 4th paragraph from the top) that the prosecution ought to have excluded all the three reasonable possibilities listed by Mr. Barber. We think the prosecution evidence did have this effect and it was because of this that the magistrate concluded that there was no explanation – i.e. no real explanation, after the three theoretical possibilities had been rejected – of the skid or swerve.

Other instances of misdirection quoted by the appellant may now be discussed:

- (1) The appellant draws our attention to the portion of the judgment which says that if the appellant had taken precautions and driven like a “prudent” driver at a reasonably safe speed, there was no reason why he should have lost control and why he should not have corrected the skid immediately. The magistrate also says that there was “undisputed evidence” that the appellant drove in the offside lane.

In fact, the only “evidence” was an assumption made by Mr. Barber to prove a certain point.

- (2) The magistrate refers to the breaking of the track rod and to the opinion of Mr. Barber that if it was broken before the impact it would cause loss of control. Then the judgment states: "But, he, as admitted by him could not positively say whether that was in fact a latent defect and in the course of cross-examination, Mr. Barber conceded that that track rod of the accused's vehicle could have been broken upon impact and that there was no wear on that track rod."
- (3) Referring to the skid, the magistrate says: "There is no positive opinion from Mr. Barber about it, and there has been none from the accused."
- (4) The defence counsel complained in his final address that the prosecution had failed to produce the extra-judicial statement made by the appellant to the police. The magistrate's comment is: "This complaint has been convincingly answered by the learned court prosecutor who has said that in the statement the accused had said nothing which was of any use."

We think there is some substance in this last objection. We do not know what the appellant said in that statement but we are sure that if the defence counsel had asked for the statement to be produced it would have been produced. The correct rule to follow is, in our opinion, this. It should be the aim of the prosecution to place before the court all the relevant evidence that it has collected. It is not bound to produce as prosecution evidence any evidence that is not favourable to its case; but it should produce whatever it thinks supports its own case and should place the balance at the disposal of the defence. There is nothing to suggest that any miscarriage of justice has resulted from the non-production of the statement in this case.

The other three grounds of objection have less substance. The magistrate does use language which may give one the impression that he is throwing the burden of proof on the defence. We are satisfied, however, that this is not in fact so. In numbers (2) and (3) he is examining the defence evidence in the light of the *Patel* case. In trying to find the explanation for the skid he examines the defence evidence rather minutely. Such explanation could have been provided equally by the prosecution evidence but no one has suggested its existence there. Number (1) is a general comment which was not essential to the magistrate's argument.

The magistrate was aware that the burden of the proof of guilt was throughout on the prosecution and that burden was, according to him, discharged "beyond any reasonable doubt".

In our view, the magistrate's judgment is correct and we dismiss the appeal against conviction. The person who died was a friend of the appellant's family and was a passenger in the appellant's car, and not somebody on the road. This factor was brought to the notice of the trial court and must have been taken into account in assessing sentence. The sentence is high but we cannot say it is manifestly excessive. Therefore, we dismiss the appeal against sentence also.

Appeal dismissed.

For the appellant:

A. R. Kapila, P. A. Clarke and S. S. Rao (instructed by *P. A. Clarke*, Nairobi)

For the respondent:

J. S. Mwangi (State Counsel)

Editor's Summary

Against this dismissal the appellant appealed, arguing that dangerous driving had not been proved, that the notice of intended prosecution had not been served within the required period, that the High Court had misdirected itself in holding that a distinction might be drawn between different reasons given by an accused for not giving evidence and that the magistrate was wrong in not ordering the production of the accused's cautioned statement.

Held – On Appeal (by Sir Charles Newbold, P., Duffus, V.-P., and Spry, J.A.):

- (i) on the facts the appellant had driven dangerously;
- (ii) no distinction may be drawn by a trial judge between a person who claims his legal right not to give evidence and one who says he has lost his memory, but this misdirection did not occasion a failure of justice;
- (iii) the magistrate was wrong in not ordering the production of the appellant's cautioned statement, which must be produced whether its effect is to assist either or neither side. The irregularity did not occasion a failure of justice;
- (iv) there is a rebuttable presumption that service was effected at the time the document would have been delivered in the ordinary course of the post;
- (v) on the evidence, on a balance of probabilities the appellant did not receive the notice before 14 October 1969, if he received it at all;
- (vi) the failure of the respondent to receive the notice was due to his illness which was not "conduct" within the Traffic Act, s. 50, proviso (i) (b);
- (vii) the requirements of the Traffic Act, s. 50, had not been complied with.

Appeal allowed.

Case referred to in judgment:

[1] *Beer v. Davies*, [1958] 2 All E.R. 255.

Judgment

The considered judgment of the Court was read by **Spry JA**: The appellant was charged in the court of the resident magistrate at Nairobi with the offence of causing death by dangerous driving, contrary to s. 46 of the Traffic Act. He was convicted, sentenced to imprisonment for thirty months and disqualified from driving for seven years. He appealed unsuccessfully to the High Court and he has now appealed to this Court.

At the beginning of the trial, counsel for the appellant submitted that no prosecution lay, as the requirements of s. 50 of the Traffic Act had not been complied with. It will be convenient here to set out the provisions of this section, which reads as follows:

"Where a person is prosecuted for an offence under any of the sections of this Act relating respectively to the maximum speed at which motor vehicles may be driven, to reckless or dangerous driving or to careless driving, he shall not be convicted unless –

- (a) he was warned at the time the offence was committed that the question of prosecuting him for an offence under some one or other of the sections aforesaid would be considered; or
- (b) within fourteen days of the commission of the offence a summons for the offence was served on him; or
- (c) within the said fourteen days a notice of the intended prosecution, specifying the nature of the alleged offence and the time and place where it is alleged to have been committed, was served on or sent by registered post to him or to the person registered as the owner of the vehicle at the time of the commission of the offence:

Provided that –

- (i) failure to comply with this requirement shall not be a bar to the conviction of the accused in any case where the court is satisfied that –

- (a) neither the name and address of the accused nor the name and address of the registered owner of the vehicle could with reasonable diligence have been ascertained in time for a summons to be served or for a notice to be served or sent as aforesaid; or
- (b) the accused by his own conduct contributed to the failure;

and

- (ii) the requirement of this section shall in every case be deemed to have been complied with unless and until the contrary is proved.”

This objection was tried as a preliminary issue but, as the judges in the High Court pointed out in their judgment, on a wrong footing. It appears to have been overlooked that the onus of proving non-compliance with s. 50 is on the accused person. The resident magistrate held on the evidence that it had been established that a notice of intention to prosecute, correctly addressed, had been posted to the appellant within fourteen days of the alleged offence and that this was complete compliance with the statutory requirement.

This decision was made a ground of appeal in the High Court but was rejected by the judges. After dealing with the onus of proof, they observed that the proper procedure is for the driver of the car and the registered owner, if he is not the driver, to give evidence that notice was not served on them. With that we respectfully agree.

As regards the main ground of the appeal before us, it is only necessary to say that the evidence clearly disclosed that the appellant was driving his car at a speed and in a manner which was dangerous to the public unless there was some explanation clearly showing that these acts occurred for reasons beyond his control. There was no such explanation – indeed he never sought to give any explanation at his trial. We agree with the resident magistrate and the High Court that on the facts the appellant was guilty of the offence charged.

It was also submitted by counsel for the appellant that the learned judges in the High Court had misdirected themselves, when dealing with a submission that the resident magistrate had attached undue importance to the fact that the appellant had not given evidence, in saying that:

“A distinction may, we think, be drawn between an accused person who in a straightforward manner announces his intention not to say anything and another accused person who does not claim his legal right as a right but says that he is not giving evidence because he has lost all memory of the happenings. In the latter case, a court is entitled to express its feeling more strongly than in the former.”

We think that is a misdirection and that no such distinction may properly be drawn, but we are satisfied that this misdirection did not occasion a failure of justice.

Counsel for the appellant further submitted that the prosecution had been at fault in failing to produce the cautioned statement made by the appellant and that the resident magistrate had misdirected himself when he upheld the submission of the prosecution that it was unnecessary to produce the statement as it contained nothing of any use. We consider that the resident magistrate was wrong and that there was no excuse for the failure of the prosecution to produce the statement in evidence. Any statement made by an accused after being charged and cautioned should be produced and it is immaterial whether the effect would have been to assist either or neither side. In this case the

statement appears to have contained the appellant's account, however unsatisfactory it may have been, of the accident. We are satisfied, however, that this irregularity did not occasion a failure of justice.

Finally, it was submitted that the High Court had erred in holding that the provisions of s. 50 of the Traffic Act had been complied with. The High Court, having considered the proper procedure, went on to consider the meaning of "sent by registered post" in s. 50 and held that it was to be interpreted literally; that it was sufficient compliance if the notice were duly posted, irrespective of whether or when it was received; and that the appellant had failed to discharge the onus of proving that notice addressed to him had not been so posted. In reaching this decision, they considered at length the relevant decisions of the English courts on the section from which our s. 50 was derived, but arrived at a different answer, as they were, of course, free to do. They remarked in this connection:

"We would normally follow English decisions on the section but in the present case we are satisfied that the latest English decisions depart from the actual wording of the law without justification. This departure may in some measure be due to section 26 of the Interpretation Act 1889 which is not part of the law of Kenya."

They had earlier remarked in relation to s. 26 of the English Interpretation Act that "Kenya law has no corresponding provision". With respect, this was a misdirection, as s. 3 (5) of the Interpretation and General Provisions Act is in terms substantially similar to those of s. 26. It was a misdirection that undoubtedly influenced the minds of the learned judges in reaching their decision.

There remains, however, the question whether the decision itself, regardless of the misdirection, was right or wrong. It was, as we have said, based on the literal interpretation of s. 50. But that section cannot be read in isolation. It must, we think, be read with s. 3 (5) of Cap. 2, to which neither the resident magistrate nor the learned judges were referred. That subsection only applies where no "contrary intention" appears, but it has not been suggested, and we can see no reason to think, that there is anything in s. 50 to exclude the provisions of s. 3 (5).

Subsection (5) of s. 3 reads as follows:

"Where any written law authorizes or requires any document to be served by post, whether the expression 'serve' or 'give' or 'send' or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing to the last known postal address of the person to be served, prepaying and posting, by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of the post."

The first part of this subsection means that the words "served on or sent by registered post to him" in s. 50 have to be read as meaning "served on him either personally or by registered post". The second part of the subsection raises a rebuttable presumption that service would have been effected at the time the document if duly posted would have been delivered in the ordinary course of post.

We heard argument on the meaning of the words "unless the contrary is proved" but we think it is clear that they can only mean "unless it is proved that the notice was not delivered in the ordinary course of post". That proof may, of course, be either that the notice was never delivered at all or that it was

delivered on some day other than the date when it would have been delivered in the ordinary course.

Reading together ss. 50 and 3 (5), we are of the opinion that the onus was on the appellant to prove that the notice was not received by him within fourteen days of the accident. If he failed to discharge this onus, the presumption of service applied. Moreover, under proviso (i) (b) to s. 50 proof that he had not received the notice in time would not avail the appellant, if it were shown that this was the result of his own conduct.

The meaning of “conduct” in this connection has occasioned us some difficulty. Obviously the proviso would apply where an accused person had deliberately evaded service, as for example by giving a false address or by refraining from clearing a Post Office box. It was never suggested that there was any such evasion in the present case. The problem is whether the proviso would apply where service was not effected as a consequence of innocent, possibly even involuntary, conduct on the part of an accused person, as for example if a man, unaware that a prosecution was contemplated, were to go away on a business trip previously planned or where, by reason of office routine of the accused, there is delay in clearing or delivering the mail. We do not propose to lay down any general rule, as it must all depend on the particular circumstances in each case.

We must now consider the evidence in the light of those principles. This was not done either in the resident magistrate’s court or in the High Court, as it did not arise on their interpretation of s. 50. Evidence was called first by the prosecution, the onus of proof not being appreciated. This established that a notice of intended prosecution was prepared and was posted, by registered post, at the General Post Office in Nairobi on 11 October 1968. What was described as a delivery card was produced, which shows that the notice reached Embakasi Post Office on 12 October. It is not disputed that 12 October 1968 was a Saturday. Evidence was given for the appellant by a senior officer in East African Airways, who testified that the appellant was sick and absent from the office on 12 October, that the box number to which the notice was addressed is that of East African Airways, that mail which reaches this office after 1 p.m. on a Friday is kept in his office to be sorted on the following Monday – the office is closed on Saturdays – and that the General Post Office is closed on Saturday afternoons.

This is very unsatisfactory evidence and it is particularly regrettable that the appellant himself did not give evidence on this issue. The onus on the appellant to prove non-service is, however, only the balance of probabilities and the balance of probabilities is undoubtedly, on the evidence, such as it is, that the notice was not received by the appellant, if at all, before Monday 14 October. It is not disputed, and indeed it was held by the High Court, that 14 October was outside the statutory fourteen days.

State counsel submitted that the evidence of office procedure was irrelevant. It may well be irrelevant in some circumstances but may nevertheless be relevant in others. It is obviously relevant in determining whether the notice was in fact received by the appellant within the fourteen days. We have held that on the evidence we are satisfied that the appellant was not served with the notice within fourteen days. Was this failure in the circumstances of this case contributed to by the conduct of the appellant? We are satisfied that quite apart from any question of what part office routine played in this failure, the appellant by reason of being sick and absent from office, would not have received the notice within the required period. We are satisfied that a condition such as sickness over which a person has little if any control cannot be said to be conduct within the meaning of proviso (i) (b) to s. 50. We are satisfied therefore that

the failure to serve the notice within the required period was not contributed to by the conduct of the appellant. Further it may well be that on the particular facts of this case the appellant has proved on the balance of probabilities that the notice would not have been delivered in the ordinary course of post before midday on Saturday and unless it would have been so delivered the notice would not have been served on him.

For these reasons, we think that there was failure to comply with the provisions of s. 50; that consequently a prosecution did not lie; and that therefore this appeal must succeed.

We have not based our interpretation of s. 50 on the English decisions but we are reinforced in our opinion by the later decisions on the corresponding English provision (particularly *Beer v. Davies*, [1958] 2 All E.R. 255) as well as by the fact that our interpretation means that the rights of an accused person are not materially different whichever of the four courses available under s. 50 is adopted by the police.

The appeal is allowed, the conviction of the appellant quashed and the sentence and order of disqualification set aside.

For the appellant:

A. R. Kapila and *P. A. Clarke* (instructed by *P. A. Clarke*, Nairobi)

For the respondent:

O. P. Nagpal (Senior State Counsel) and *Mrs. C. Khayanga* (State Counsel)

Republic v Ofunya and others [1970] 1 EA 78 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	7 July 1969
Case Number:	265/1968 (130/69)
Before:	Miller J
Sourced by:	LawAfrica

[1] *Criminal Practice and Procedure – Sentence – Consecutive or concurrent – Whether court can order prison sentence in default of payment of fine to run concurrently with other prison sentence – Criminal Procedure Code (Cap. 75), s. 14 (K.) – Penal Code (Cap. 63), ss. 28 and 37 (K.).*

Editor's Summary

The magistrate convicted the respondents of offences under two different Acts, imposed fines with prison sentences in default of payment, and ordered that if the respondents went to prison the sentences were to run concurrently. The order was brought to the High Court on review.

Held – a sentence of imprisonment in default of payment of a fine cannot be made concurrent with any other sentence of imprisonment.

Sentence varied.

No cases referred to in judgment.

Judgment

Miller J: This is a criminal matter which came up to the High Court by way of review under the provisions of s. 364 of the Criminal Procedure Code (Cap. 75). It was immediately disposed of at the hearing and I now give the reasons for the manner of disposal. Three accused persons were jointly charged and convicted on their pleas of guilty to two offences namely:

1. Being in possession of African Spiritous Liquor contrary to s. 3 (1) of the Liquor Act (Cap. 122, Laws of Kenya), and
2. Being in possession of plant Cannabis Sativa (Bhang) contrary to s. 10 (E) of the Dangerous Drugs Act (Cap. 245, Laws of Kenya).

The Makadara District Magistrate who heard the case imposed these sentences, i.e.

“(1) Count 1 – Fined Shs. 200/-; in default two months’ imprisonment.

(2) Count 2 – Fined Shs. 50/-; in default one month’s imprisonment.

Both sentences to run concurrently if they go to prison.”

Two of the convicted persons failed to pay the fines and were duly committed to prison whereupon the prison authorities inquired of the trial magistrate as to the accuracy of the order of concurrent serving of the sentences in default of payment of the fines and sought amendment of the commitment warrants. The magistrate confirmed his original view stating as follows:

“The offences for which the convicts were sentenced were two different offences each with its own count, thus each offence had its own punishment; therefore the court is of the opinion that it was justified to order concurrent execution of the sentences by virtue of the discretion given to it by section 37 of the Penal Code and section 14 (1) of the Criminal Procedure Code as the offences were committed on the same day at the same time and in the same transaction.”

This view did not find favour with the Public Prosecutions Department hence the ruling of this court has been sought. Section 14 (1) Criminal Procedure Code provides:

“When a person is convicted at one trial of two or more distinct offences, the court may sentence him, for such offences, to the several punishments prescribed therefor which such court is competent to impose; such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the court may direct, unless the court directs that such punishments shall run concurrently.”

It is clear that these provisions give the court a discretion at one trial to alter the consecutive order in which sentences of imprisonment are to commence or to direct that such sentences run concurrently but this does not supply the answer to the present inquiry. Chapter VI of the Penal Code treats of Punishments and in relation to fines as punishments its s. 28 (1) (c) (1) provides:

“(c) in the case of an offence punishable with imprisonment as well as a fine in which the offender is sentenced to a fine with or without imprisonment, and in every case of an offence punishable with fine only in which the offender is sentenced to a fine the court passing sentence may, in its discretion –

- (1) direct by its sentence that in default of payment of the fine the offender shall suffer imprisonment for a certain term, which imprisonment shall be in addition to any other imprisonment to which he may have been sentenced or to which he may be liable under commutation of sentence.”

These latter provisions have been qualified in their effect primarily as fines as punishments by the proviso to s. 37 of the Penal Code which section, although designated “Sentences when cumulative”, is a partial restatement of the provisions of s. 14 (1) Criminal Procedure Code reproduced above. By the proviso,

“it shall not be lawful for a court to direct that a sentence of imprisonment in default of payment of a fine shall be executed concurrently with a former sentence under sub-paragraph (1) of paragraph (c) of subsection (1) of Section 28 of this Code or any part thereof”. In my view the legislature created a specific distinction with respect to the court’s discretion in cases of punishments by way of fines as opposed to punishments when consisting of imprisonment simpliciter and the provisions of the proviso to s. 37 are mandatory. It would appear that the phrase “such punishments when consisting of imprisonment” in s. 14 (1) of the Criminal Procedure Code is being taken to include punishment where imprisonment ensues as an alternative in cases of default of payment of fines. I do not subscribe to this view, for taxing and penal statutes are not to be construed in this manner. Having defined “offence” as an act, attempt or omission punishable by law in the Penal Code the legislature proceeded to give specific treatment to those cases where the sanction for an offence is fine as opposed to imprisonment. The relevant provisions must therefore be strictly construed according to their terms and not by reference to other penal provisions unless there is express power so to do. The order of imprisonment in default of payment of the fines should have been consecutive and not concurrent; and this court ordered accordingly.

Sentence varied.

For the appellant:

H. G. D. Graham (State Counsel, Kenya)

The respondents were unrepresented.

M and another v The Commissioner of Income Tax
[1970] 1 EA 80 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	24 January 1969
Case Number:	61 and 62/1968 (143/69)
Before:	Madan J
Sourced by:	LawAfrica

[1] *Income Tax – Appeal – Assessment – Whether separate memorandum of appeal necessary in respect of every assessment – East African Income Tax (Management) Act 1958, s. 111 (i) – Income Tax (Appeal to the Kenya High Court) Rules 1959, rr. 3 (1), 4, 5 (K.).*

Held – a separate memorandum of appeal must be filed in respect of each assessment appealed against.

Appeals struck out.

Cases referred to in judgment:

- (1) *A.C. v. The Commissioner of Income Tax*, 2 E.A.T.C. 76.
- (2) *A.G. et al (as Trustees) v. The Commissioner of Income Tax*, 2 E.A.T.C. 113.
- (3) *Bell v. The Commissioner of Income Tax*, 3 E.A.T.C. 102.

Judgment

Madan J: These two appeals have been consolidated by consent of the parties.

Each appellant has lodged only one memorandum of appeal relating to four assessments in each case for the years of income 1963, 1964 and 1965.

The respondent the Commissioner of Income Tax has taken a preliminary objection that both appeals are incompetent as the appellants have failed to file a separate memorandum of appeal in respect of each assessment appealed against as required by s. 111 (1) of the East African Income Tax (Management) Act 1958, and also rr. 3 (1), 4 and 5 of the Income Tax (Appeal to the Kenya High Court) Rules 1959.

Section 111 (1) (so far as relevant) provides that any person who has given a valid notice of objection to an assessment (*italics mine*) and, consequent thereon, has been served with a notice under sub-s. (3) of s. 110 (under which the Commissioner notifies his refusal to amend the assessment) may appeal to a judge.

Rule 5 provides:

“The memorandum of appeal shall be accompanied by –

- (a) a copy of the confirming notice, the amending notice, the notice of the decision of the Commissioner, or the notice of the decision of the local committee, as the case may be; and
- (b) a copy of the notice of appeal.”

A similar objection was taken in *A.C. v. The Commissioner of Income Tax*, 2 E.A.T.C. 76, when the respondent while not pressing the objection asked the court to express an opinion on it. Edmonds, J., in that case said s. 78 (1) – he was dealing with the matter under the East African Income Tax (Management) Act 1952, since repealed – provided for an appeal against “an assessment”, and the rules made under that Act, with particular reference to r. 5, clearly contemplated the filing of a memorandum of appeal in relation to each separate assessment. The learned judge added that this is the proper and correct practice which must be followed.

The same objection was made again, this time before Macduff, J., in *A.G. et al (as Trustees) v. The Commissioner of Income Tax*, 2 E.A.T.C. 113, who said although the respondent generously waived the objection, he would repeat for the benefit of future appellants the decision in *A.C. (supra)* that s. 78 (1) provided for an appeal against “an assessment”, and the rules, with particular reference to r. 5, clearly contemplated the filing of a Memorandum of Appeal in relation to each assessment, which is the proper and correct practice and one which must be followed.

These two warnings went unheeded. The respondent’s generous disposition faded and he raised the matter again by way of a preliminary objection in *Bell v. The Commissioner of Income Tax*, 3 E.A.T.C. 102, which was also heard by Macduff, J., who after a detailed examination of the subject repeated what he had stated in *A.G. et al (supra)*, and upholding the preliminary objection declared the appeal before him incompetent.

In my view the position is no different under s. 111 (1) and the 1959 rules. Only one assesment may be appealed against in one memorandum of appeal. I trust this further confirmation of the proper and correct practice to be followed in the matter of income tax appeals will once and for all jugulate any different practice.

The reason for the requirement that each assessment must be separately appealed against is not far to seek. I think it must be to avoid cluttering up the issues by jumbling several assessments relating to different years of income in one memorandum of appeal. It makes no difference that the issues both as to fact and law are the same in respect of all the years of income concerned

as in the instant case. The respondent is entitled to object and he has objected although in the particular circumstances of the present two appeals he might well have allowed his original generous disposition to be resurrected as strict adherence to procedural requirements in these two cases would only have produced a multiplicity of appeals without any advantage of a saving in time or costs. On the other hand rules of procedure are made to be observed and they must be observed.

The two appeals now before the court are incompetent and they will be struck out with costs.

Learned counsel for the appellants asked for leave to file fresh appeals out of time. The two appeals having been ordered to be struck out the court now is not seised of the matter. If so advised the appellants must begin again applying if necessary for leave to appeal out of time.

Appeals struck out.

For the appellants:

J. A. Mackie-Robertson, Q.C. and S. M. Akram (instructed by Akram and Esmail, Nairobi)

For the respondent:

J. M. Khaminwa (Principal Assistant Legal Secretary)

Neon & Norlo Signs (Kenya) Ltd v Alarkhia and others
[1970] 1 EA 82 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	12 February 1969
Case Number:	1031/1966 (144/69)
Before:	Harris J
Sourced by:	LawAfrica

[1] *Contract – Condition precedent – Whether condition precedent to the formation of the contract.*

[2] *Contract – Condition – Promissory condition – Whether failure to comply gives action for damages.*

[3] *Contract – Frustration – Failure to comply with condition – Whether frustration.*

Editor's Summary

The defendants agreed with the plaintiff for the hire from it of neon signs to be erected on premises not belonging to the defendants. The contract provided that it was the duty of the defendants to obtain the permission of the landlord of the premises on which the signs were to be erected. The hiring was to commence from the date of the erection of the signs. The plaintiff constructed the signs but the defendants failed to obtain the consent of the landlord to their erection. The plaintiff sued the defendants

for damages for breach of contract.

Held –

- (i) the obtaining of consent to the erection of the signs was not a condition precedent to the operation of the contract;
- (ii) the obligation undertaken by the defendants was a promissory condition, and the failure to comply with it did not frustrate the contract.

Judgment for the plaintiff.

Cases referred to in judgment:

- (1) *Davis Contractors Ltd. v. Fareham Urban District Council*, [1956] A.C. 696.
- (2) *Howard & Co. (Africa) Ltd. v. Burton*, [1964] E.A. 540.

(3) *Karachi Gas Co. Ltd. v. Issaq*, [1965] E.A. 42.

Judgment

Harris J: On 10 December 1964 a contract in writing was concluded between Neon Associates, therein described as “a division of H.D. Holdings Ltd.” and referred to as “the Owner”, of the one part, and Abdul Gulamali Alarakhia, therein described as a company “having its registered office at Haile Selassie Road, Mombasa (trading as City Grocers)” and referred to as “the Hirer”, of the other part. References are also made in the contract to “the lessor” and “the lessee”, terms which counsel agreed should be taken to mean “the Owner” and “the Hirer” respectively. In these proceedings the former is represented by the plaintiff and the latter by the defendants, and it will be more convenient in this judgment to refer to them and their respective predecessors in that manner.

The contract, which is described on its face as a “rental and maintenance agreement”, provides in clause 1 that the plaintiff shall let and the defendants shall take on hire two electric neon signs, collectively referred to in the contract as “the Sign”, to be “constructed and erected” by the plaintiff at its own expense at the defendants’ premises on Haile Selassie Road, Mombasa. Clauses 2 and 3 fix the duration of the hiring at a period of sixty months from the date of “completion of the erection” of the signs at a monthly rent of Shs. 130/-.

Difficulties have arisen by reason of the fact that the premises upon which the signs are to be erected are not the property of the defendants and are merely leased to them by a third party, to whom I will refer as “the landlord”, and who refuses to permit the erection of the signs on the premises. No evidence was called at the hearing and it was conceded that the plaintiff has already constructed the signs and has been at all material times ready and willing to erect them as agreed, that the defendants have done all they can to obtain the landlord’s consent to the erection of the signs and have received from the plaintiff every assistance in that behalf, but that, in view of the landlord’s refusal of consent, the signs have not been erected, the period of hiring has not commenced, the signs are of no value except to the defendants, and the plaintiff has been paid no rent. The plaintiff accordingly claims damages for breach of contract and, subject to the issue of liability, the damages have been agreed at the sum of Shs. 6,000/-.

The contract contains also the following clauses:

9. OWNERSHIP OF THE SIGN:

The Sign shall at all times be and remain the property of the Owner and shall not, by reason of its attachment or connection to any immovable property, become or be deemed to have become a fitting, fixture or appurtenance of such property but shall at all times be severable therefrom. The Hirer shall procure that the Sign is specifically excluded from any mortgage, charge or other security or encumbrance now existing or at any future time granted or created over such immovable property. Upon the termination of this Agreement or any extension thereof the Owner shall be entitled to remove the Sign from the premises upon which it is installed and for that purpose to enter upon such premises. The Owner or any of its employees or agents may also, at all reasonable times during the continuance of the hiring, enter upon such premises for the purpose of inspecting the Sign and effecting any necessary repairs or adjustments thereof.

10. REMOVAL OF THE SIGN:

The Sign shall only be used at the premises above designated and shall not be removed therefrom without the consent in writing of the Owner first had and obtained. The Hirer shall notify the Owner of the name and address of the owner of the premises to which the Sign shall from time to time be affixed and of any change of ownership or of the address of such owner forthwith upon the occurrence of the same.

12. OTHER AGREEMENTS AND UNDERTAKINGS:

This Agreement contains and covers all the agreements and undertakings of the parties hereto relative to the Sign and the hiring thereof and the Owner shall not be responsible for or liable under or in respect of any undertaking, representation, agreement or warranty, whether written or verbal, which is not specified or contained herein. No variation or amendment of or addition to the terms and conditions hereof shall be binding on the parties hereto unless the same is made in writing signed by the parties hereto.

13. DELIVERY:

The Owner shall, as soon as may be practicable after the date hereof, commence and proceed diligently with the construction of the Sign but the Owner shall not be responsible for delay occasioned by strikes, breakages, fires, unforeseen commercial delays, acts of God, acts or defaults of the Hirer, refusal or postponements of necessary permissions or any other causes not within the direct control of the Owner.

14. PERMITS:

The Hirer shall obtain all necessary permits, permissions, licences and consents from the owner of the premises upon which the Sign is to be erected, and public or other authorities whose permission is or may be requisite for the erection, maintenance and use of the Sign and shall be responsible for ensuring that such permits, permissions, licences and consents once obtained shall not be revoked or withdrawn. The Owner will, however, afford to the Hirer all reasonable assistance in obtaining the same and maintaining them in force, by way of expert advice or otherwise.

The following issues were agreed by counsel:

- (a) Are the defendants, having failed to obtain the landlord's consent, liable to pay damages to the plaintiff by virtue of clause 14 of the contract?
- (b) Does the fact that the defendants made all *bona fide* efforts to obtain consent from the landlord excuse them from the obligation to pay damages for the breach of clause 14, their efforts having proved unsuccessful?

Having regard to these issues and to the line of argument adopted and acquiesced in by counsel for the parties, I will assume both that the landlord's consent was essential in law to enable the plaintiff to proceed with the erection of the signs and that the failure to obtain such consent was not attributable to unwillingness on the part of the defendants to comply with any lawful condition, however onerous, which the landlord, acting within his rights, sought or might have sought to impose upon them.

Counsel for the plaintiff contends that, although clause 14 of the contract

does not specify a limit of time within which the landlord's consent must be obtained, the clause should be read as implying that a reasonable time only should be allowed, particularly in view of the fact that clause 13 imposed an express obligation on the plaintiff to proceed as soon as practicable after the execution of the contract with the construction of the signs. He maintains that the terms of clause 14 are mandatory; that, by virtue of clause 12, nothing can be implied therein to lessen its strict effect as was done in *Karachi Gas Co. Ltd. v. Issaq*, [1965] E.A. 42; and, relying on *Howard & Co. (Africa) Ltd. v. Burton*, [1964] E.A. 540, that what had occurred does not entitle the defendants to rely upon the doctrine of frustration.

The defendants do not dispute the plaintiff's contention as to the time factor but submit that clause 14 of the contract indicates clearly that the parties were aware of the necessity to obtain the landlord's consent, the securing of which was therefore a condition precedent and a sine qua non; that the clause imposed obligations on both parties which they have fulfilled so far as possible; that clause 13 should be read as being subject to clause 14; and that clause 12 does not have the effect suggested by the plaintiff. Alternatively, the defendants rely on frustration and the law as laid down in the *Karachi Gas Co.* decision, though distinguishing that case on the facts.

The contract, which is a printed form with blank spaces for the insertion of particulars and was prepared by the plaintiff, is not very aptly designed to meet the circumstances of this case or, indeed, of any case where neither of the parties is the owner of the premises upon which such signs are to be erected. Clause 9, for instance, purports to provide that the signs should not, by reason of their attachment to the premises, become or be deemed to be fixtures. This is clearly a matter which might affect, in a case such as the present, the position of the landlord notwithstanding that he is not a party to the contract. Similarly clause 10 states that the signs shall not be removed from the premises without the consent of the plaintiff, which again might well be in derogation of the rights of the landlord.

The material clauses for present purposes, however, are numbers 13 and 14. Of these, the latter requires the defendants to obtain all necessary permissions and consents from the landlord, while clause 13, which imposes on the plaintiff an obligation to commence the construction of the signs "as soon as may be practicable" after the date of the contract, expressly relieves the plaintiff of responsibility for delays occasioned by, inter alia, the "refusal or postponements of necessary permissions" or any other causes not within its direct control. The responsibility against which relief is thus afforded manifestly includes that imposed by clause 13 itself relative to the commencement of the work. The plaintiff's claim is in substance founded upon its compliance, to the full extent which circumstances have permitted, with the obligation created by that clause, that is to say, the completion of the design and manufacture of the component parts of the two signs but not their actual erection on the building, all of which together constitute a prerequisite to the commencement of the hiring in respect of which alone the monetary consideration under clause 3 is to arise.

In determining the true construction of clauses 13 and 14 there must be borne in mind the principles that it is the words actually used which are to be looked to rather than possible alternative expressions, and that in the very last resort it may be permissible for the removal of doubt to construe the instrument somewhat more strongly against the plaintiff as its author than against the defendants. On the other hand this is not one of those cases where the court is asked to deal with a provision in a contract which, by reason of being printed in smaller type than other portions or of being placed in an inconspicuous position, could be said to have been calculated to escape the notice of one of the parties. The clauses with which we are dealing are plainly to be seen.

Furthermore, neither of the parties could be said to fall within the category typified by the unwary housewife who is overborne by the blandishments of the enterprising door-to-door salesman and in a moment of enthusiasm contracts to purchase goods which she neither requires nor can afford. Here the position would appear to be that each of the contracting parties was at the time of the agreement a trading concern operating in the commercial life of this country and desirous of concluding an ordinary business arrangement. In the light of this background I consider that the terms of the contract should be construed with reasonable strictness and on the footing that the parties intended those terms to bear their ordinary meaning.

I am unable to accept the defendants' contention that clause 14 of the agreement indicates an awareness on the part of the plaintiff at the material time of the fact that there was in existence a specific person such as the landlord whose consent was essential and that therefore the obtaining of that consent by the defendants should be regarded as a condition precedent. The terms of the clause are clearly framed as general provisions designed to meet a necessity that might arise in any particular instance for the securing of consent from third parties, public or private, whose consent might be required, but there is no evidence that at the time of the execution of the present contract the plaintiff was aware of the fact that the defendants did not themselves own the entire of the building. In regard to clause 13 it is sufficient to say that, not only does it specifically oblige the plaintiff as soon as practicable after the date of the agreement to commence and proceed diligently with the "construction" of the signs, as distinct from their "erection", but the benefit of the saving provision designed to meet the case of delay occasioned by the refusal of necessary permissions is restricted to the plaintiff. In my opinion this line of defence is not available to the defendants.

It remains now to deal with the defence of frustration. Although this branch of the law of contract has been productive in modern times of much learned and informed exposition, the researches of counsel stopped short at the two cases of *Howard & Co. (Africa) Ltd. v. Burton*, [1964] E.A. 540 and *Karachi Gas Company Ltd. v. Issaq*, [1965] E.A. 42. In Howard's case a caterer contracted with an engineering company to supply meals to the company's employees, numbering up to 2,500 persons, on the footing that the company would make a compulsory deduction from the employees' wages towards the cost of the meals and that no further charge would fall upon the employees. This arrangement worked well for some time but subsequently, as part of the terms of settlement of a dispute with the employees over conditions of service, the company agreed to discontinue making the deduction and to leave it to the employees to take and pay for the meals if they so desired. This resulted in an almost complete cessation of a demand for meals and, in an action for damages for breach of contract on the basis of loss of catering profits, the caterer was held entitled to succeed on the ground, amongst others, that the company had owed a duty to him to attempt to effect such a solution of the labour dispute as would not jeopardize his position and that, having failed in this duty, it could not successfully rely upon frustration. The *Karachi Gas Company* case concerned a contract for the exportation from Kenya to Pakistan of goods the importation of which into Pakistan required a licence. It was common ground that the defendant should be responsible for the obtaining of this licence and, on its failing to do so, the plaintiff claimed damages for breach of contract. The defendant sought to rely on frustration but the court held that, since the defendant had failed to establish that it had taken all reasonable and necessary steps to obtain the licence, the defence of frustration could not succeed. Neither of these decisions is directly in point in the present case for, on the facts as agreed, the defendants here have done everything possible to secure the landlord's

consent but without success. How, then, in these circumstances, is the plea of frustration to be treated?

Having regard to the state of the authorities it would not be easy to demarcate with any degree of certainty the line at which a defendant becomes entitled successfully to resist, on the ground of frustration, a plaintiff's claim for breach of contract brought about by a supervening factor which rendered it impossible for the defendant to avoid the breach. The criterion to be applied, however, where, without either party being in default, some circumstance has intervened to render the implementation of the contractual agreement not feasible would seem to depend primarily upon the intention of the parties at the time of entering into the contract. This intention is to be gathered from the language of the contract as a whole, construed in the light of the surrounding circumstances including the nature of the transaction in hand.

In the present case the fulfilment of the obligation undertaken by the defendants to obtain the landlord's consent is a vital factor in the carrying out of the contract between the parties, with the result that the obligation constitutes in relation to the contract, not only a condition in contradistinction to a warranty, but what the learned editors of Chitty on Contracts (22nd Edn., Vol. 1, para. 578) term a "promissory condition", that is, an essential stipulation of the contract which one party undertakes or promises will be fulfilled, the non-fulfilment of which will give rise to a right of action for breach. The obligation here is clearly expressed and defined and, when construed in the context of the defendants having no legal right or title to authorize the plaintiff to erect the signs on the landlord's premises without his consent, leaves no room for doubt as to there being present in the mind of the original hirer (that is, the predecessor in title of the defendants) the absolute necessity to apply for and to obtain that consent. In the absence of evidence to the contrary I am satisfied that this knowledge must have carried with it the additional knowledge that, rightly or wrongly, the landlord might demur at giving his consent. With all this knowledge in mind the defendants, as part of the bargain with the plaintiff, undertook, perhaps rashly but none the less unequivocally, the burden of obtaining the landlord's consent; while the plaintiff, in reliance on the bargain, commenced and completed at its own expense the construction of the signs which it had agreed to erect. Are the defendants to be entitled to say, now that they have found it impossible to carry out their part of the bargain, that the plaintiff is to be deprived of the ordinary remedies afforded by law for breach of contract and that, instead, the contract is to be discharged on the ground of frustration? I do not think so.

The common law of England relating to contract applies to this country, subject to the provisions of the Law of Contract Act (Cap. 23), and the doctrine of frustration forms part of that law today. It is appropriate therefore to turn to English case-law for assistance, and authoritative guidance is to be found in the speeches in the House of Lords in *Davis Contractors Ltd. v. Fareham Urban District Council*, [1956] A.C. 696. There the appellant, a building contractor, agreed to erect a number of houses for a fixed sum and within a fixed period of eight months but, owing to unexpected labour troubles and without the fault of either party, the time actually required was nearly trebled and the cost to the contractor greatly enhanced. After the completion of the work the contractor sought to increase the contract price on a quantum meruit basis, contending that the original agreement should be treated as at an end since it was entered into on a particular footing which itself had disappeared with the result that the entire project had developed commercially into a totally different project. The House, affirming the decision of the Court of Appeal, unanimously rejected this contention. I do not propose to examine closely the several grounds upon which the law lords based their conclusion but I would

observe that the decision itself was referred to with approval by both Crawshaw and Crabbe, JJ.A., in *Howard's* case (supra) and that the principles which it lays down would appear to be applicable also to the present case.

For the reasons which I have indicated I allow the claim.

Judgment for the plaintiff.

For the plaintiff:

W. S. Deverell (instructed by *Kaplan & Stratton*, Nairobi)

For the defendants:

Satish Gautama (instructed by *G. S. Sandhu & Co.*, Nairobi)

Barclays Bank DCO v Patel
[1970] 1 EA 88 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	11 September 1969
Case Number:	7/1969 (145/69)
Before:	Sir Charles Newbold P, Duffus VP and Law JA
Sourced by:	LawAfrica
Appeal from:	The High Court of Kenya – Chanan Singh, J.

[1] *Land – Easement – Way of necessity – Whether it exists when not referred to in the certificate of title to the servient tenement – Registration of Titles Act (Cap. 281), s. 32 (K.).*

[2] *Land – Easement – Way of necessity – Whether way abandoned.*

[3] *Land – Easement – Way of necessity – Whether way must be confined to user of dominant tenement at date of creation of way.*

[4] *Land – Easement – Way of necessity – Whether it ceases to exist with the cessation of the necessity.*

[5] *Land – Easement – Way of necessity – Interference with – Whether damages can be awarded.*

Editor's Summary

Certain land in Nairobi bordering on the Langata Road was subdivided in 1941 and sold to different owners. The appellant was the successor in title of the purchaser of the plot bordering on the Langata Road and the respondent was the successor in title of the purchaser of the other plots. At the time of the subdivision the respondent's plots could legally be used only for agricultural and personal residential

purposes. There was no legal way of access from the respondent's plots to any public road, and no road of access was registered against the title to the appellant's plot. All the titles were registered under the Registration of Titles Act. There was little evidence of user of any way across the appellant's land during a period of 17 years. The respondent's access to his property across the appellant's property was interfered with and he sued in the High Court for a declaration that he was entitled to a way of necessity across the appellant's land and for damages.

The High Court granted to the respondent damages and a declaration that he was entitled to a way of necessity unlimited as to user or time. The appellant appealed contending that an easement could not exist over its land in view of the unqualified certificate of title issued to the appellant under s. 23 of the Registration of Titles Act, that the way of necessity had been abandoned, that the appellant was only entitled to a way limited to agricultural and personal residential use and limited while the necessity continued, and that damages should not have been awarded.

Held –

- (i) a way of necessity arose by operation of law on the subdivision of the property and would continue to exist for as long as the necessity existed notwithstanding that it was not referred to in the certificate of title to the servient tenement;
- (ii) lack of evidence of user did not prove abandonment of the way;
- (iii) as the dominant tenement could only have been used for agricultural and personal residential purposes at the date of the creation of the way of necessity, the way must be limited to user for those purposes;
- (iv) the way would exist only so long as the necessity for it existed;
- (v) the appellant was responsible for the acts of interference with the way and damages were properly awarded.

Appeal allowed in part.

Cases referred to in judgment:

- (1) *Titchmarsh v. Royston Water Co.* (1899), 81 L.T. 673.
- (2) *Suleman Virji v. Afua* (1923), 9 K.L.R. 167.
- (3) *Farrar v. Adamji* (1934), 16 K.L.R. 40.
- (4) *Tayebali v. Abdulhusein* (1938), 5 E.A.C.A. 1.
- (5) *Barry v. Haseldine*, [1952] 2 All E.R. 317.
- (6) *Govindji v. Nathu*, [1962] E.A. 373.
- (7) *Gathure v. Beverley*, [1965] E.A. 514.
- (8) *Byramjee v. Attorney-General*, [1966] E.A. 198.

The following considered judgments were read:

Judgment

Sir Charles Newbold P: This is an appeal by Barclays Bank D.C.O. (hereinafter referred to as the bank) which is the administrator as attorney for the executrix of the estate of P. J. Henning, against a decision of the High Court declaring that Mr. K. N. Patel, the owner of plots LR.2255/1 and LR.2255/2, is entitled to a way of necessity along the eastern boundary of plot LR.2255/3/2, which is vested in the bank as such administrator, from the Langata Road to his plots and to damages of Shs. 2,000/- in respect of the wrongful obstruction of such way of necessity by a person for whose action the bank was responsible.

In 1919 a farm of 152 acres was granted on leasehold by the Crown to a Mr. Patrick for agricultural and personal residential purposes. The title was registered under the Registration of Titles Ordinance as LR.2255, and the southern boundary of this farm was a road reserve which subsequently became the Langata Road. In 1928 LR.2255 was transferred to a Mr. Tebbutt who in 1941 submitted to the Commissioner of Lands a sub-divisional plan dividing the land into three parts, which parts were

eventually registered as LR.2255/1 and LR.2255/2 (the back plots) and LR.2255/3 (the front plot), the last of which bounded on the Langata Road. There was no means, except with the permission of the surrounding owners, of getting to the back plots and the plan attached to the sub-divisional proposals showed a right of way 20 feet wide running from the Langata Road along the eastern boundary of the front plot to the back plots. This plan was approved by the Commissioner of Lands in 1941, but it is not in dispute that this approval did not of itself give rise to any rights. In 1944 Mr. Tebbutt sold the back plots to Mr. Moore and neither the transfer nor the plan attached thereto nor the certificate of title referred to any right of way to these properties from Langata Road over the front plot

which remained in Mr. Tebbutt's ownership. In 1945 Mr. Tebbutt sold the front plot to Mr. Henning. Neither the transfer nor the plan attached thereto nor the certificate of title disclosed any right of way over the land from Langata Road to the back plots and both the transfer and the certificate of title specifically stated that the land was not subject to any encumbrances. In 1947 Mr. Henning subdivided the front plot into two plots – LR.2255/4 and LR.2255/3/2 – and sold LR.2255/4 to Mr. Matthews. LR.2255/4 (the Matthews plot) comprised the north-western corner of the front plot and as in the case of the back plots there was no right of access except over LR.2255/3/2 (the Henning plot). Both the transfer of the Matthews plot and the plan attached thereto show a right of access from Langata Road along a part of the eastern boundary of the Henning plot and then transversely across to the Matthews plot. The certificate of title of the Matthews plot refers to this easement. There are detailed provisions relating to this road of access in the transfer of the Matthews plot, which transfer is registered against the certificate of title of the Henning plot. In 1948 Mr. Moore's lawyer wrote to Mr. Moore, who apparently had claimed a right of way over the front plot, stating that he had been informed by Mr. Henning that Mr. Moore must confine his road of access to the 20 ft. strip on the eastern boundary of the front plot, though there is no evidence of the user either before or after this date by Mr. Moore of this road of access, and the condition of the ground was such that this strip would not normally have been used by wheeled traffic. This letter was held to be admissible by the trial judge and it was shown by Mr. Moore to Mr. Patel as proof of the existence of a right of way over the front plot when in 1965 Mr. Moore sold the back plots to Mr. Patel. The transfer to Mr. Patel, which is registered against the certificate of title of the back plots, does not refer to this right of way and there is no plan attached to that transfer. In 1966 Mr. Patel placed a caveat against the Henning plot claiming a right of way. Later in 1966 Mrs. Henning, as executrix of her deceased husband's estate, agreed to sell the Henning plot "subject to the alleged right of way claimed by" Mr. Patel to Mr. Matthews and Mr. Matthews went into possession and remains in physical possession of that land. By the Land Control Act 1967, s. 6, that agreement is void for all purposes. There is evidence which the trial judge accepted that Mr. Matthews, who was in physical possession of the Henning plot, obstructed Mr. Patel in the use of the way of access along the eastern boundary of that property. Mr. Patel has, in fact, obtained access to his properties, but it is clear that such access was either by trespass or by leave or licence of the adjoining owners who might at any time revoke it. As no agreement could be reached in respect of the existence of the way of access from Langata Road over the Henning plot to the back plots, in 1968 Mr. Patel filed a suit against the bank claiming a declaration that there exists a road of access 20 ft. wide along the eastern boundary of the Henning plot and seeking damages for the obstruction of such right of way. Mr. Matthews was brought in as a third party by the bank but on his giving a full indemnity to the bank the proceedings continued between Mr. Patel and the bank only. Mr. Patel based his claim to the right of way on prescription, lost modern grant, and a way of necessity but the trial judge rejected all the grounds other than that founded on its being a way of necessity, which he held that it was. He also held that the bank was responsible for the acts of obstruction committed by Mr. Matthews. Accordingly, he gave a declaration that Mr. Patel was "entitled to use the way of necessity along the eastern boundary of . . ." the Henning plot and that Mr. Patel was entitled to Shs. 2,000/- damages.

From this decision the bank has appealed and counsel for the appellant has urged the following points. First, that if the trial judge was right in holding that the way of necessity exists then he should have limited its user to agricultural and residential purposes. Secondly, that the trial judge was wrong in awarding damages against the bank in respect of any acts of obstruction committed by

Mr. Matthews. Thirdly, that Mr. Patel was not entitled to the easement of a way of necessity as no reference to such easement existed either in the transfer to Mr. Patel or in his certificate of title or in the transfer to Mr. Henning or in his certificate of title, all of which documents had been issued subsequent to the creation of the alleged way of necessity and that by reason of the provisions of the Registration of Titles Act (Cap. 281) no such easement existed over the Henning plot.

Dealing with the third point first, under the Judicature Act 1967, s. 3, the common law of England on 12 August 1897 is the common law of Kenya, subject to the provisions of the Constitution and to any legislation, “so far as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances render necessary”. Under the common law of England, where a landowner grants part of his land to a grantee and no possible way of entry to one of those parts exists, other than a way based upon the permission of a neighbouring owner or upon trespass, then a way of necessity arises by implication of the law over the other part (see *Titchmarsh v. Royston Water Co.* (1899), 81 L.T. 673 and *Barry v. Haseldine*, [1952] 2 All E.R. 317). This was the position which arose in 1944 when Mr. Tebbutt sold the back plots to Mr. Moore. There is nothing in the circumstances of Kenya or of its inhabitants which would require any qualification in the application of such common law to Kenya. I am satisfied therefore that, subject to any change effected as a result of legislation, on such sale in 1944 under the common law of Kenya a way of necessity arose over the front plot from Langata Road to the back plots. I shall consider later the exact nature of such way of necessity.

It is urged, however, that by reason of the provisions of the Public Roads and Roads of Access Act (Cap. 399) the legislation of Kenya has substituted for the way of necessity which arises under the common law a statutory means of obtaining access to land. Under that Act a landowner may apply to a Board for the right to make a road of access over another’s property in order to obtain reasonable access to a public road or railway station. The Act gives to the Board a discretion to grant or refuse the application and power to grant the application subject to conditions such as the payment of compensation, alignment and the maintenance of the road. The existence of a discretion is wholly alien to the common law concept of a way of necessity and the conditions which may be imposed are equally alien to the common law position under which no compensation is payable and the alignment is determined by the owner of the land over which the way runs, and by the limited nature of a way of necessity and the right of the person entitled to the way of necessity to abandon it should some other means of access be obtained. I am satisfied that this Act has not abolished the common law way of necessity but has merely provided a means whereby, under wider and different circumstances, a land owner may acquire and make a road of access over another’s land.

It is next urged that, even if a way of necessity arose in 1944 under the common law on the sale by Mr. Tebbutt to Mr. Moore of the back plots, this way of necessity was an easement and as it was not registered under the Registration of Titles Act (Cap. 281) (hereinafter referred to as the Act), which applied both to the back and to the front plots, and as the back plots were sold in 1965 by Mr. Moore to Mr. Patel without any mention of this easement and the front plot by Mr. Tebbutt to Mr. Henning in 1945 equally without being made subject to the easement, this easement of a way of necessity no longer exists. Section 2 of the Act defines land as including “all paths, . . . ways, . . . easements . . . thereon or thereunder lying or being” and s. 20 provides that “all land . . . shall not be capable of being transferred . . . or otherwise dealt with except in accordance with the provisions of this Act and every attempt to transfer . . . or otherwise deal with the same except as aforesaid shall be null and void and

of no effect". Section 34 provides that "when land . . . or any right of way or other easement is intended to be created or transferred, the registered proprietor . . . shall execute . . . a transfer . . . which transfer shall . . . contain an accurate statement of the land and easement . . . intended to be transferred or created, and a memorandum of all . . . charges and other encumbrances to which the same may be subject, and of all rights of way, easements . . . intended to be conveyed" and ss. 35 and 36 provide for the registration of the transfer of the easement and the issue of a certificate of title. Finally, s. 23 (1) provides that "the certificate of title issued by the Registrar to any purchaser of land upon a transfer . . . shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof subject to the encumbrances, easements . . . endorsed thereon, and the title of such proprietor shall not be subject to challenge . . .". It is urged that as the easement of the way of necessity does not appear on the certificate of title of either the back plots or the front plot and as s. 23 states that the certificate of title is to be conclusive evidence that the registered proprietor is the absolute and indefeasible owner of the land mentioned therein subject to the easements endorsed thereon, the right to the way of necessity in the proprietor of the back plots has ceased to exist and the owner of the front plot, now the Henning plot, is no longer subject to this easement.

In the many countries in the Commonwealth in which there exists legislation relating to the registration of title to land based on the *Torrens* system – and the Act is so based – the interpretation of the section similar to s. 23 providing for the conclusiveness of the register has given rise to difficulty. Not all such legislation requires, as the Kenya Act does, that easements should be registered, a fact which shows that under the *Torrens* system there may exist interests in land which are not registrable or need not appear on the register and yet nevertheless may be enforceable despite the provision that the register shall be conclusive evidence. It is also to be noted that such Commonwealth legislation differs as to what the register is conclusive evidence of; in Kenya it is conclusive evidence that the person named in the certificate of title as the proprietor of the land is the absolute and indefeasible owner thereof subject to the encumbrances endorsed thereon, which appears to be a very wide and all-embracing provision. Nevertheless the Act itself provides, without, be it noted, any reservation in s. 23, for an interest in land which may validly exist without registration, as s. 41 provides that a lease for a term not exceeding 12 months shall be valid without registration. Thus it is clear that the words of s. 23 are to be read subject to certain limitations and that the absence from the certificate of title of certain interests in land is not conclusive that those interests do not exist (see *Farrar v. Adamji* (1934), 16 K.L.R. 40). On the one hand it is obvious that unless the whole object of the legislation is to be undermined what has been described as the sanctity of the register should be maintained (see *Govindji v. Nathu*, [1962] E.A. 372; *Suleman Virji v. Afua* (1923), 9 K.L.R. 167; and *Byramjee v. Attorney-General*, [1966] E.A. 198). On the other hand it is clear that despite s. 1 (2) of the Act, which provides that no legislation inconsistent with the provisions of the Act shall apply to registered land, rights over land acquired by virtue of the provisions of other statutes, such as rights acquired by prescription, have effect even though they are not entered on the register (see *Gathure v. Beverley*, [1965] E.A. 514 and *Tayebali v. Abdulhusein* (1938), 5 E.A.C.A. 1). Similarly, it seems hardly open to doubt that where legislation charges certain sums, such as rates, on land, the fact that the charge does not appear on the certificate of title or on the register does not make the charge ineffective. Equally, it seems clear that registered land is liable to satisfy the debts of the registered owner in execution proceedings and that in the event of bankruptcy such land will vest in the trustee in bankruptcy although nothing to that effect appears either on the certificate of title or on the register. Also,

there can be no doubt that rights which are by law inherent to the ownership of land, such as the right to support of the land itself and the right to receive water flowing in a defined channel from adjoining lands, exist and may be enforced notwithstanding that no memorandum of such rights appears on the register or on the certificate of title either of the land itself or of the land which has the burden of providing the support or of permitting the flow of water. Analysing the nature of the rights and liabilities which are effective even though not entered on the register, it appears that s. 23 of the Act should have full effect in respect of rights or liabilities expressly created by the owner thereof on or over the land, other than rights or liabilities such as leases for under 12 months which by the Act itself do not have to be registered, but that the section is not to be construed as making ineffective those rights or liabilities on or over land which come into existence by reason of the operation of law, even though such rights or liabilities do not appear on the register and are not referred to in the certificate of title. Thus, if the owner of land expressly creates an easement over it in favour of adjoining land, then unless the existence of such easement appears on the register and the certificate of title it will have no effect, at any rate as regards the subsequent owners. If, however, the easement arises by operation of the law, even though the operation of law comes into existence by reason of express acts of the owner of the land, then the easement will exist over the land and have effect notwithstanding the fact that it does not appear on the certificate of title. In this case, as I have already stated, the easement of a way of necessity arose by operation of the law on the division of the original farm into the back plots and the front plot. This easement never appeared on the register or on the certificate of title of any of these plots, but so long as the easement of a way of necessity exists by operation of the law thus long will the easement continue to have effect over the front plot, now the Henning plot, even if it is not entered on the register or on the certificate of title.

I turn now to consider the first of the points made by counsel for the appellant and in doing so I shall consider the nature of a way of necessity and the circumstances in which it will continue to exist. The title of this easement – a way of necessity – aptly describes the nature of the easement. It arises by operation of law in favour of a landowner on the division of land because it is a matter of necessity and vital to the effective ownership of one part of the land that the owner thereof should have access to it. Were this not the position the law would not confer on a landowner a benefit which he has not himself seen fit to acquire expressly. Thus it will not arise if the owner has any other right of access to the land which is physically practicable; but a means of access based upon permission which may be withdrawn or upon trespass will not prevent the easement from arising. As it is a way of necessity, the nature of the way is related to the user of the land at the time the easement came into operation as it is only in relation to such user that it is necessary for the law to bring into operation the easement. Moreover, it will continue in existence only so long as the necessity exists. Thus the easement will cease if the owner acquires a right of access to the land by any other means. The owner of the land over which the way of necessity runs is not entitled to any compensation, since the necessity for the way must have been envisaged by him at the time he entered into the transaction which brought into operation the easement, but as it results in partial sterilisation of part of his land he is entitled to determine the alignment of the way and to ensure that it is no greater than the necessity requires. As the way is for the benefit of a landowner, the cost of making and maintaining the way of necessity falls upon the owner of the land for whose benefit it exists. In order to enable that owner to make and maintain the way of necessity, he, together with his servants and agents, is entitled on reasonable notice to enter upon the land and carry out all such works as are necessary for those purposes. The right to a way of necessity may be extinguished not only by the acquisition

of a different right of access to the land but also by abandonment. It must, however, be clear that the easement has been abandoned; and while non-user for a long period will be some evidence of abandonment, it must be clear indeed that such non-user was due to the abandonment of the easement.

Applying these principles to the facts of this case, since the back plots at the time they came into existence could only be used for agricultural and personal residential purposes, it is clear that Mr. Moore could not be entitled to a way of necessity for any other purpose. Nor could Mr. Moore enlarge the nature of the way of necessity by any enlargement of the user of the back plots. The width of the way and its alignment was a matter for the determination of Mr. Tebbutt, who continued to be the owner of the front plot on which the way ran. This had in fact been done by the sub-divisional plan which showed a 20 ft. road of access running along the eastern boundary of the front plot; and this width and alignment were subsequently confirmed by the statement of Mr. Henning to Mr. Moore's lawyers that the way of access should be confined to the 20 ft. strip on the eastern boundary. While there is little or no evidence of user between 1948 and 1965, there is no evidence of the existence of any other way of entry enjoyed by Mr. Moore as of right, and I do not consider that the lack of evidence of user points conclusively to abandonment. I am satisfied therefore that in 1944 Mr. Moore acquired by operation of law the easement of a way of necessity 20 ft. wide running along the eastern boundary of the front plot from the Langata Road to the back plots and that he continued to own this easement until 1965, notwithstanding that it was not entered on the register and did not appear on his certificate of title and notwithstanding that the front plot was subsequently sold to Mr. Henning whose certificate of title did not show that his land was subject to the easement. When in 1965 Mr. Moore sold the back plots to Mr. Patel this easement which was attached by operation of the law to the back plots continued to be so attached after the transfer, notwithstanding that it was not referred to in the transfer or placed on the register, as the necessity which brought the easement into existence continued to exist. Mr. Patel therefore is entitled to such a way of necessity limited to agricultural and his residential user of the back plots. For such purpose Mr. Patel is entitled on reasonable notice to enter with his servants and agents upon the Henning plot and to construct and maintain at his cost such a way of necessity. As a part of such way has already been constructed, Mr. Patel is not liable to contribute to the cost of such construction but he is liable to contribute his proper proportion of the cost of the future maintenance of that part. I am satisfied that the effect of the judgment and decree of the trial judge is to declare that Mr. Patel is entitled to an unlimited way of necessity over the Henning plot and that the decree requires variation in relation to the nature of this way of necessity.

Finally, the second point urged by counsel for the appellant was that the bank was not liable for any acts of obstruction committed by Mr. Matthews, together with a suggestion that no act of obstruction had been committed. I think it clear that the acts of Mr. Matthews in putting up the notice board restricting the road to his user, in reporting the matter to the police and in informing Mr. Patel that he was not to use the road amounted to obstruction. Under the void agreement for sale of the Henning plot Mr. Matthews was only entitled to possession of that plot on payment of the balance of the purchase price, which so far as the evidence goes was never done. In fact, Mr. Matthews was let into possession on the signing of the agreement, which agreement contained a clause showing clearly that the bank was aware of the dispute over the right of way and took steps to indemnify itself against any damages awarded as a result of this dispute. In these circumstances I am satisfied that the acts of Mr. Matthews in obstructing Mr. Patel are acts for which the bank is responsible

and, accordingly, that the trial judge was right in awarding damages against the bank.

For these reasons I would dismiss the appeal except in so far as it seeks a variation of the decree and allow it in that respect. I would vary the decree by substituting for paragraph (1) the following paragraph:

“That it is declared that the plaintiff is entitled to use a 20 ft. wide way of necessity limited to agricultural and personal residential purposes along the eastern boundary of L.R. 2255/3/2. And it is further declared that, for the purpose of constructing and maintaining at the cost of the plaintiff such part of such way of necessity as has not already been constructed, the plaintiff, together with his servants and agents, may on giving reasonable notice enter on such land. And it is still further declared that in respect of such part of such way of necessity as has already been constructed the plaintiff shall be liable for his proportionate share of the expense of maintaining such part. And it is yet further declared that the entitlement of the plaintiff to the user of, and his liability for the maintenance of, such way of necessity shall continue only as long as in law the necessity for such way continues to exist.”

As regards the cost of the appeal, the bank has failed on the main and on a minor issue but has succeeded on an important, though not the main, issue. I think the most suitable course, taking the position on the appeal as a whole, would be to make no order for costs on the appeal. As the other members of the Court agree it is so ordered.

Duffus VP: I agree with the judgment of my Lord President.

Law JA: I have read in draft the judgment prepared by the learned President, which sets out the facts and the history of events relevant to this appeal. The point which has caused me most concern is the one described by counsel for the appellant as being the substantial point in the appeal, and that is that the benefit of an easement of a way of necessity, if such an easement ever came into existence, could not pass on the transfer of the servient tenement unless it was registered against the title under the Registration of Titles Act. By s. 23 of that Act, the certificate of title is conclusive evidence that the proprietor of land is the absolute owner thereof subject to the encumbrances, easements, etc. endorsed thereon. The respondent's alleged right to a way of necessity does not appear on his certificate of title or on the certificate of title of the servient tenement. In these circumstances, counsel for the appellant submitted, the easement has ceased to exist, and to give effect to the respondent's claim it would be necessary to find that his right is not an easement, or that it is a special type of easement which for some reason is excepted from the requirement of registration. In my view that is the position in this case. A way of necessity differs from most easements in that it is not created whether by grant or otherwise; it arises by implication of law when part of a piece of land is alienated, and the owner of that part has no way of entry to his land except through the other part. True, the respondent in this case has access to his land over other land, but such means of access are permissive and not legally enforceable, so that this does not affect his right to a way of necessity over the appellant's land. Sections 34, 35 and 36 of the Act refer to the creation, transfer and registration of easements, from which I infer that the easements which must be registered, so as to ensure their continued existence on the transfer of land affected thereby, are easements which have been “created” and not easements which arise by implication of law such as a way of necessity. Although a way of necessity is generally referred to as an easement, it is in my

view more correctly to be described as a right inherent to the right of property, comparable to the right of support or the right to light. Such rights are not “created” but owe their existence to the very nature of things and do not, in my view, require to be registered. I agree however with counsel for the appellant that the decree appealed from is objectionable in that it purports to declare the existence of a way of necessity in general terms. I do not think this was the learned judge’s intention, as appears from the following extract from his judgment:

“I should not be understood as sanctioning any extension of the purpose for which a way of necessity, if established, can be used.”

The decree must make this clear, and I agree with the substituted paragraph (1) thereof proposed by the learned President. I agree that in all other respects the appeal fails, and I concur in the orders proposed as to costs.

Appeal allowed in part.

For the appellant:

W. S. Deverell (instructed by *Kaplan & Stratton*, Nairobi)

For the respondent:

M. K. Bhandari (instructed by *Bhandari and Bhandari*, Nairobi)

Kisebu v Ogenga
[1970] 1 EA 96 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	18 September 1969
Case Number:	117/1968 (147/69)
Before:	Kneller J
Sourced by:	LawAfrica

[1] *Advocate – Audience – Legal Secretary – Whether Legal Secretary can act for persons other than the Community – Advocates Act (Cap. 16), s. 9 (K.).*

[2] *Civil Practice and Procedure – Appearance – Appearance struck out – Whether defendant should be given opportunity to engage another advocate – Civil Procedure (Revised) Rules 1948, O. 9, rr. 3 and 6, O. 49, r. 5.*

Editor’s Summary

Appearance was entered and defence filed in the Resident Magistrate’s Court on behalf of the appellant by the Legal Secretary to the East African Common Services Organization, later the East African

Community. The appellant was a servant of the East African Posts and Telecommunications Administration. At the hearing the magistrate ruled that the Legal Secretary could not be heard, struck out the appearance and defence and gave judgment for the respondent. He held that the Legal Secretary could only act as advocate for the Community.

Held –

- (i) the Legal Secretary can act as an advocate for persons other than the Community;
- (ii) the magistrate was wrong in not allowing the appellant an adjournment to appear in person or by another advocate.

Judgment set aside. Case remitted for hearing.

Cases referred to in judgment:

- (1) *R. v. Archbishop of Canterbury*, [1903] 1 K.B. 289.
- (2) *Attorney-General v. Bastow*, [1957] 1 All E.R. 497.
- (3) *Chief Nehemia Gitonga v. Stephen Kinyanjui*, [1959] E.A. 1096.
- (4) *Attorney-General v. Harris*, [1960] 1 Q.B. 31.

Judgment

Kneller J: Mweu Kisebu, the appellant, was the defendant in the suit before the Resident Magistrate, and at the relevant time employed by the East African Posts and Telecommunications Administration in this city.

The respondent in this appeal, Josiah Ogenga, was the plaintiff in the court below.

On 17 November 1967 appearance was entered for the appellant by the Legal Secretary to the East African Common Services Organization as advocate for the defendant and served upon the advocates for the respondent.

On 30 November 1967 the appellant's defence was drawn and filed by the same advocate, namely the Legal Secretary to the Organization, and served on the advocates for the respondent. The suit came on for hearing before the Resident Magistrate in Nairobi on 25 September 1968.

Turning aside for a moment, I note that on 1 December 1967 the Organization became the Community by the Treaty for East African Co-operation Act 1967 (No. 31 of 1967) and the Legal Secretary and the Deputy Legal Secretary and any person holding office in the Legal Secretary's Chambers became Counsel to the Community by virtue of the Treaty for East African Co-operation Order 1968 (L.N. No. 43 of 1968).

The Court below struck out the Memorandum of Appearance and the Defence. It ruled that the Assistant Legal Secretary had no standing and could not be heard further. It gave judgment *ex parte* for the respondent and heard evidence under O. 9, rr. 6 and 3 as formal proof of damages.

The Resident Magistrate's ruling is in these terms:

"This Ruling concerns the legal representation of a party before the Court.

This is a case where the Defendant, an employee of the East African Posts and Telecommunications Administration is sued for damage alleged to have been done by him whilst driving a vehicle belonging to East African Posts and Telecommunications Administration, to the Plaintiff's motor car. The accident took place in Nairobi on 27th November, 1965. East African Posts and Telecommunications Administration have not been made a party to these proceedings, and the Defendant is the sole person sued.

A purported Memorandum of Appearance was entered by the Legal Secretary, East African Common Services Organization, for the Defendant, the Legal Secretary describing himself as 'Advocate for the Defendant'. A purported Defence was also drawn, signed and filed by the Legal Secretary.

At this hearing the Assistant Legal Secretary to the East African Community presented himself, and said that he was representing the Legal Secretary.

It should be stated here that since 1st December, 1967 the East African Common Services Association, which apparently comprised, *inter alia*, East African Posts and Telecommunications Administration, has been taken over by the East African Community (see Treaty for East African Co-operation Act, 1967 (c. 31)).

The Advocates Act (c. 16) now comes in point, section 9, as far as material, states: –

‘Each of the following persons shall, if duly qualified as a legal practitioner (by whatever name called) in any country at the time of his appointment to his office, be entitled in connection with the duties of his office to act as an advocate, and shall not to that extent be deemed to be an unqualified person, that is to say –

- (a) . . .
- (b) the Legal Secretary and the Deputy Legal Secretary of the Organization and any person holding public office in the Legal Secretary’s Chambers . . .’

The ‘Organization’ is defined in the Interpretation and General Provisions Act (c. 2) section 3 (1) as meaning the East African Common Services Association and is hence now comprised in the East African Community. However for the sake of convenience the body will be referred to in this Ruling as ‘the Organization’.

Whilst it is clear from the Advocates Act, section 9 as above quoted, that the Legal Secretary (and his accredited subordinates) ‘is entitled in connection with the duties of his office to act as an advocate’ for the Organization, it is equally clear that this is meant to be merely an exception to the general rule that only advocates qualified and authorised under the Act are entitled as advocates to represent members of the public. The Legal Secretary can act as an advocate when, and only when, the Organization is concerned as a party to legal proceedings, but not otherwise. The Organization was not and never has been made, a party to these present proceedings, and it is therefore incompetent to the Legal Secretary to assume the role of advocate herein.

The fact that the Defendant is an employee of East African Posts and Telecommunications Administration and is being sued for an act which may possibly have been done whilst acting in the course of such employment is neither here nor there. As far as this action is concerned he stands as a private individual, and if he wished to be legally represented this should have been by an advocate qualified and authorised under the Act (cf. section 8).

The Assistant Legal Secretary did put forward the point that he is in fact an advocate, but this does not help. The Memorandum of Appearance and the Defence purport to have been effected through a public officer namely the Legal Secretary, and must stand or fall on this footing. Clearly they fall.

To deal now firstly with the purported Memorandum of Appearance. Order III, Rules 1 and 2, govern ‘appearance’. These, as far as material, may ‘be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf’ – see Rule 1. Rule 2 provides that ‘recognised agents’ are persons holding powers of attorney. There was no such power of attorney here, and as the Defendant did not enter the appearance himself, and as the Legal Secretary was not an advocate ‘duly’ appointed the Memorandum of Appearance is a nullity, and is accordingly struck out.

This, without any reference to the purported Defence, consequently concludes this part of the case, but for the record the Court also strikes out the Defence as a nullity, it having been improperly signed (see Order VI, Rule 25) and filed by an incompetent person, and as being scandalous in the terms of Order VI, Rule 17.

Finally the Court rules that the Assistant Legal Secretary, as representing

the Legal Secretary, has no standing in these proceedings and cannot be heard further.”

The Memorandum of appeal dated 6 November 1968 was drawn and filed by Counsel to the Community. The grounds were:

“The Resident Magistrate erred in Law:

1. In refusing to admit the Memorandum of Appearance Defence and presence of the Assistant Legal Secretary, East African Community, as Advocate for the Defendant;
2. In wrongly determining the duties of the office of the Legal Secretary and the right of the Legal Secretary to act as an Advocate in respect of these duties;
3. In ruling that the defence of an employee of the Organization in connection with an act done in the course of his employment was outside the scope of the duties of the office of the Legal Secretary;
4. IN THE ALTERNATIVE, and without prejudice to the foregoing, the learned Magistrate erred in not allowing the Defendant to enter a late appearance, to defend in person, or to engage another advocate of his own choice.

Wherefore the Appellant prays that the Judgment, Ruling and Decree of the Resident Magistrate be reversed and set aside and that the suit be tried de novo, and that the costs of this appeal and of the hearing before the lower Court be awarded to the Appellant.”

It was not in dispute that the memorandum of appearance and defence were drawn and filed by an advocate of the High Court of Kenya called Mr. Ferro who was at the time an assistant legal secretary in the chambers of the Legal Secretary of what was then called the East African Common Services Organization or that Mr. Ferro was at the time holding a qualification specified in paras. (a), (b), (c) and (d) of s. 12 of the Advocates Act (Cap. 16). The Organization is defined in s. 2 of the Interpretation and General Provisions Act (Cap. 2). Article 1 (1) (a) and the First Schedule to the East African Common Services Organization Act (Cap. 4) reveal that the East African Posts and Telecommunications Administration is a service administered by the Organization. Article 41 (1) (d) of the same Act establishes the Chambers of the Legal Secretary. Pausing there for a moment, it can be said that the Legal Secretary is also the Legal Secretary to the Administration. His official duties are nowhere defined. The standing of the Legal Secretary, and Mr. Ferro, in the courts of Kenya are defined in s. 9 of the Advocates Act (Cap. 16).

“Each of the following persons shall, if he holds one of the qualifications specified in paragraphs (a), (b), (c) and (d) of Section 12 (1) of this Act at the time of his appointment to his office, be entitled in connexion with the duties of his office to act as an advocate, and shall not to that extent be deemed to be an unqualified person, that is to say –

- (a) the Attorney-General, the Solicitor-General, and any person holding public office in the Attorney-General’s Chambers;
- (b) the Legal Secretary and the Deputy Legal Secretary of the Organization, and any person holding public office in the Legal Secretary’s Chambers or in the East African Income Tax Department;
- (c) the Registrar-General and any person holding public office in his Department;
- (d) the Principal Registrar of Titles and any Registrar of Titles;

- (e) any person holding office in a municipal council, county council or urban or area council established or deemed to have been established by or under the Local Government Regulations 1963.”

The Postmaster General was not made a party to this suit, suggested Counsel to the Community, because the suit was filed outside the period of limitation: see s. 108 (b) of the East African Posts and Telecommunications Act (Cap. 4, Revised Edition, 1951).

Mr. Bhatt did not vouchsafe any reason for not joining the Postmaster General or the Administration or the Organization save to say that it was deliberate. He harped on the plain fact that it was only the appellant who was sued and thought perhaps that this was due to the fact that the accident was said to have happened at about 7.50 a.m. when it might be said the appellant was not within the scope of his duties. There was no application by the Postmaster General or the Administration or the Organization to be made a party. He admitted that the Organization was rightly interested or had an interest in this suit but pointed out that it was not a party to it and had not asked to be joined.

The only East African authority, *Chief Nehemia Gitonga v. Stephen Kinyanjui*, [1959] E.A. 1096, and three English decisions: *R. v. Archbishop of Canterbury*, [1903] 1 K.B. 289, *Attorney-General v. Bastow*, [1957] 1 All E.R. 497 and *Attorney-General v. Harris*, [1960] 1 Q.B. 31, were not in point for they concerned, respectively, the rights of a Kenya Crown Counsel (in 1959) to act as an advocate and his right of audience on appeal from the Supreme Court (as it then was) of Kenya to the Court of Appeal for Eastern Africa, the right of the Crown to appoint the Treasury Solicitor to be solicitor for the Archbishop and the Attorney-General of England’s discretion in bringing a relator action. Nor am I persuaded that O. 3, rr. 1 and 2 cover the Legal Secretary, Deputy Legal Secretary or any person holding public office in his chambers.

The sole question, at this stage, is whether or not Mr. Ferro was entitled to act in this suit as an advocate in connexion with the duties of his office?

The Organization had an interest in this suit because the appellant was its servant, acting in the scope of its employment, driving a vehicle which belonged to it, which was involved in an accident, which the appellant was said to have caused by his negligence, during the time he was on duty and the Postmaster-General and/or the Organization might have been held vicariously liable for the negligent act or acts of the appellant in the course of his duty.

I find that Mr. Ferro was. The magistrate misdirected himself when he wrote:

“... The Legal Secretary can act as an advocate when, and only when, the organization is concerned as a party to legal proceedings, not otherwise ...”

If the magistrate were correct, the Advocates Act would have said so.

And if this is wrong, then I hold that the magistrate erred in not granting the appellant an adjournment and time to file a Memorandum of Appearance, a Defence and to appear in person or to engage another advocate of his own choice. He was, through no fault of his own, deprived of any opportunity to appear or to defend. He should have been encouraged to make an application under O. 49, r. 5.

The appeal succeeds.

Order: The judgment, ruling and decree of the subordinate Court be set aside and a new trial of this suit shall be had.

Judgment set aside.

For the appellant:

J. M. Khaminwa (Principal Assistant Legal Secretary)

For the respondent:

M. J. Bhatt (instructed by *Archer & Wilcock*, Nairobi)

Nzivo v Republic
[1970] 1 EA 101 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	30 July 1969
Case Number:	550 to 567/1969 (148/69)
Before:	Mwendwa CJ and Wicks J
Sourced by:	LawAfrica

[1] Criminal Practice and Procedure – Sentence – Accumulation of minor offences – Whether sentence imposed excessive.

Editor's Summary

Between 25 April 1968 and 10 July 1968 the accused was on eighteen separate occasions charged with carrying excess passengers in a public vehicle contrary to s. 100 (2) of the Traffic Act (Cap. 403) (K.).

On the eighteen notices to attend Court, he entered pleas of guilty in writing. It seems that there was considerable delay in dealing with most of the cases. Finally, on 17 May 1969 a magistrate reviewed the eighteen cases and imposed fines totalling Shs. 1910/- and aggregate terms of imprisonment in default amounting to 1,090 days.

The appellant appealed against sentence.

Held – while each sentence was not excessive, looking at that case alone, the appellant was not responsible for the accumulation of the cases, and looking at the totality of the cases, the sentence was manifestly excessive.

Appeal allowed. Appellant released immediately.

No cases referred to in judgment.

Judgment

The judgment of the Court was read by **Mwendwa CJ**: This appeal was consolidated with seventeen others. All of them concerned the same appellant and in each case the appellant was charged with carrying excess passengers in a public vehicle contrary to s. 100 (2) of the Traffic Act (Cap. 403). The

vehicle involved was the same in each case and the offences were committed between 25 April and 10 July last year.

The appellant was fined a total of Shs. 1910/- and the total term of imprisonment imposed in default of payment of the fines was 1,090 days, that is five days less than three years. He appealed against sentence in each case. We allowed the appeal and in Criminal Appeal 551 we reduced the sentence of 90 days to such a period as would result in his being released on the morrow, that is on 23 July 1969, and in each of the other cases we quashed the sentence and imposed an absolute discharge under s. 35 (1) of the Penal Code. We reserved our reasons for so doing which we now give.

The appellant was the driver of a public service vehicle which was used on the Nairobi, Machakos route, and in each case he made a written plea of guilty on the reverse side of the notice to attend court on the same day or within a few days after the offence was committed. Although a return day for attendance at the Machakos magistrate's court was stated on each notice to attend court, in most of the cases the case was not dealt with by the magistrate until long after, in some cases about three months after, and in each case a fine was imposed. The appellant gave as his address c/o Chief Zakariah Mwayo, Rusinga Island, P.O. Box Homa Bay. In each case the appropriate letter was sent to the appellant

by post but there is no evidence that he received them. In some of the cases notices to show cause were issued but it seems that the appellant could not be found. The appellant was arrested and brought before the District Magistrate on 17 May 1969 when the magistrate in each case imposed a sentence of imprisonment in default of payment of the fine.

When an accused person is required, by a notice, to attend court on a stated day, and enters a written plea of guilty, the magistrate should deal with the case on the stated day. Here the magistrate failed to do so. The first two offences were alleged to have been committed on 25 April 1968 and in each case the notice required the appellant to appear in court on 9 May 1968. By that date three further offences had been committed but had the magistrate dealt with the first two cases on the set day, it is possible that the appellant, knowing the penalty for the violations, would not have committed the remaining thirteen. As it was it could be said that the appellant was lulled into a belief that the violations were considered to be of such little importance that they did not carry a sanction.

When the eighteen cases came before the magistrate on 17 May 1969 a glance at the files must have made it clear that the position had arisen in the magistracy through a failure to comply with proper procedure. Looking at each case alone, the fine, and sentence of imprisonment in default imposed, is not excessive, but looking at the totality, for the accumulation of which the appellant was in no way responsible, the total of the fines imposed and the total of the term of imprisonment to be served in default was manifestly excessive.

Appeal allowed.

The appellant was absent and unrepresented.

For the respondent:

J. B. Karugu (Senior State Counsel)

Masesi v Republic
[1970] 1 EA 102 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	30 July 1969
Case Number:	486/1969 (149/69)
Before:	Mwendwa CJ, and Wicks J
Sourced by:	LawAfrica

[1] *Criminal Law – Theft – Consent – No evidence given by complainant that the property was taken against his consent.*

[2] *Criminal Practice and Procedure – Jurisdiction – A magistrate may not increase his own limited jurisdiction by the artifice of imposing an excessive fine with a term of imprisonment in default.*

Editor's Summary

The accused was convicted of stealing a goat and sentenced to imprisonment for twelve months, to receive twelve strokes of the cane and to pay a fine of Shs. 2,000/- and in default of payment, to a further term of imprisonment for twelve months.

The evidence was that the accused took the goat from his elder brother's boma in part payment for some land he had sold to the elder brother. The elder brother (the complainant) did not give evidence but the mother and sister testified that the accused had the mother's permission to take the goat in part payment of the sale of the land to the elder brother.

Both mother and sister conceded that the elder brother's permission for the accused to take the goat had not been expressly authorised.

On appeal the conviction was quashed on the ground that theft was not proved.

Held further that the magistrate was wrong to have fined the accused an excessive fine and in default of payment twelve months' imprisonment as a device to get round the magistrate's jurisdiction limited to twelve months' imprisonment.

Appeal allowed.

No cases referred to in judgment.

Judgment

The judgment of the court was read by **Mwendwa CJ**: The appellant was convicted by the magistrate on one charge of stealing stock contrary to s. 278 of the Penal Code and sentenced to serve a term of imprisonment of 12 months, to receive 12 strokes of the cane, and to pay a fine of Shs. 2,000/-, in default of payment of which he was to serve a further term of 12 months' imprisonment. We allowed the appeal, quashed the conviction and set aside the sentence, and reserved our reasons for so doing which we now give.

At the trial the evidence for the prosecution was that one Ndonye s/o Kailu, who is employed by the complainant, found one of his employer's goats missing and, as a result of what he was told, he reported the matter to the sub-chief Jonathan Kibwa. The sub-chief went to the appellant's house where he found the meat of a goat and its skin. The appellant said he had taken the goat from the complainant's boma and he had done this because the complainant "had his money and that is why he had taken the goat". The complainant was in Nairobi and his wife, Francisca Ndunge, said she returned from Nairobi, where she had visited her husband, and found that the appellant had stolen and slaughtered the goat and had been arrested, charged with the theft, and was awaiting trial.

The appellant made an unsworn statement in his defence in which he said that the complainant was his elder brother. That in 1967 he sold his shamba to his elder brother for Shs. 670/- and part of that sum, he did not know how much, remained unpaid. That his mother gave him authority to take the goat, and he took it in lieu of the money which the complainant owed. The appellant called three witnesses whose evidence in chief fully supported this claim of right. Nzisa w/o Mulla the appellant's mother said that the appellant came to her and asked her about the goat, which she allowed him to take, that as her other son, the complainant, was in the process of buying the appellant's land, she told the appellant that the goat would be taken into account as part payment for the land. Syowia d/o Mulla, the appellant's sister, confirmed that Nzisa allowed the appellant to take the goat as also did one Mutune s/o Mulla.

The defence was unequivocally a claim of right and, the complainant not having given evidence, was not inconsistent with the evidence of the prosecution witness. Questioned by the magistrate Nzisa w/o Mulla said the complainant "did not allow me to authorise Masesi (the appellant) to take his goat and without his consent" and Syowia d/o Mulla said the complainant "has not authorised Nzisa to allow Masesi to take the goat". This does not take the matter any further for the reason that had the complainant been called he may or may not have supported the appellant's claim of right. From this two consequences follow, first there was no admissible evidence of the theft of the goat, and second, even had there been

such evidence, there was a claim of right put forward by the

appellant which was in no way answered or attacked. This was a “family matter”, we do not say “dispute”, for the reason that there may not be one; had the complainant given evidence he may have said that it was within the terms of the agreement to sell the land that the appellant should take the goat. For these reasons we allowed the appeal.

There is another matter we must refer to. Before passing sentence the magistrate, *inter alia*, is recorded as saying:

“As this court is only allowed to impose a prison sentence of 12 months only, and the accused deserves a longer sentence, and in order that he is kept away for about two years I have to impose further fines on him failing which he will receive a further 12 months, this will make a total of 2 years imprisonment which is adequate to the accused.”

The magistrate then proceeded to sentence the appellant to pay a fine of Shs. 2,000/- or serve a further term of imprisonment of 12 months in addition to the sentence of 12 months’ imprisonment. The magistrate’s jurisdiction is, indeed, limited to 12 months’ imprisonment. It is not permissible for the magistrate, as he has attempted to do in this case, to enlarge his jurisdiction by the artifice of imposing a fine. If the law provides for a fine, s. 28 (1) (a) of the Penal Code provides that it shall not be excessive. Here the magistrate has specifically set the fine at such a high figure that it could not be within the appellant’s ability to pay it, and perforce he must serve the term of imprisonment in default. The fine was as a result excessive and wrong in principle. Further it is provided under s. 278 of the Penal Code, the provision under which the appellant was charged and convicted, that the term of imprisonment is fourteen years and no provision is made for the imposition of a fine. The imposition of a fine was, as a result, unlawful.

Appeal allowed.

The appellant was absent and unrepresented.

For the respondent:

J. B. Karugu (Senior State Counsel)

Gichina v Republic
[1970] 1 EA 105 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	30 July 1969
Case Number:	432/1969 (151/69)
Before:	Mwendwa CJ and Wicks J
Sourced by:	LawAfrica

[1] *Criminal Law – New criminal offence – Whether accused may be charged with the new offence*

based on acts committed prior to creation of the offence.

[2] Evidence – Corroboration – Possessor of stolen property – Corroboration of evidence of possessor required when possession not free of taint.

Editor’s Summary

On 25 March 1969 the new offence of handling stolen goods came into force by virtue of s. 5 of the Criminal Law Amendment Act 1969 (3 of 1969) amending 322 of the Penal Code.

In respect of acts occurring on the night of 3 and 4 January 1969 the accused was charged with the offence of handling stolen goods. The new offence did not exist on that date, the Act having no retrospective effect. Accordingly on appeal the conviction was quashed and the sentence set aside.

A re-trial was not ordered because the only evidence against the accused was the uncorroborated evidence of a witness who had been found in possession of the stolen property and who alleged she bought the stolen property from the accused. The latter denied he sold the property to her.

Appeal allowed.

No cases referred to in judgment.

Judgment

The judgment of the court was read by **Mwendwa CJ**: The appellant was charged before the magistrate with one count of theft contrary to s. 275 of the Penal Code and, in the alternative, handling stolen goods contrary to s. 322 (2) of the Penal Code. In his judgment the magistrate found that there was no evidence that the appellant stole, but there was evidence that he was in illegal possession of the article alleged to have been stolen and he was convicted on the alternative charge and sentenced to serve a term of imprisonment of 21 months. He appeals against his conviction and sentence. Senior State Counsel, who appeared for the State, did not support the conviction. We agreed that the conviction could not be allowed to stand. We allowed the appeal, quashed the conviction, and set aside the sentence and reserved our reasons for so doing, which we now give.

Section 322 of the Penal Code which created the offence of receiving stolen property was repealed by s. 5 of the Criminal Law Amendment Act 1969 (3 of 1969) and the same section substituted a new s. 322 of the Penal Code creating the offence of handling stolen goods, the alternative offence with which the appellant was charged and of which he was convicted. The Criminal Law Amendment Act came into force on 25 March 1969. The particulars of the offence allege that it was committed on the night of 3 and 4 January 1969, that is before the Act came into force. There is no provision in the Act giving it retrospective effect, with the result that the appellant was convicted of an offence that did not exist at the time when the offence is alleged to have been committed. We must point out that had the Act been in force at the time of the

alleged offence the sentence imposed, a sentence of 21 months imprisonment would have been illegal, the sentence provided being imprisonment with hard labour for a term of not less than seven years.

This is not a case where a retrial should be ordered. The facts were very simple. The complainant, a mattress maker, found two mattresses and a pillow missing. About two weeks later one of the mattresses was found in the possession of one Dorcas Wairimu. Questioned, she said that she had purchased the mattress from the appellant for Shs. 30/-. The appellant was arrested. There was no admissible evidence implicating him in the theft, other than the statement of Dorcas Wairimu that he had sold it to her, and he denied any knowledge of it at the trial. Accepting that the mattress had been stolen, Dorcas Wairimu was in possession of stolen property, and before it was safe to rely on her evidence implicating another, there must be independent evidence that her possession was free from taint. This evidence could be such as a written receipt identifying the mattress, stating a reasonable price and signed by the seller, or the evidence of independent witnesses who were present when the transaction was carried out. In this case there was no such evidence and the appellant was convicted on the bare statement of one who was found in possession of stolen property, and one who had an interest to shift the blame to another. To convict on such evidence is against the weight of the evidence. If this were not so few thieves, or receivers, would be convicted and many innocent persons would suffer conviction and imprisonment for their crimes.

For these reasons we allowed the appeal.

Appeal allowed.

The appellant was absent and unrepresented.

For the respondent:

J. B. Karugu (Senior State Counsel)

Rambhai & Co (Uganda) Ltd v Lalji Ratna and another
[1970] 1 EA 106 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	25 October 1969
Case Number:	436/1967 (154/69)
Before:	Phadke Ag J
Sourced by:	LawAfrica

[1] *Civil Practice and Procedure – Action against partners – Whether against partners individually.*

[2] *Civil Practice and Procedure – Pleading – Want of form – Whether objection can be taken – Civil Procedure Rules, O. 6, r. 6 (U.).*

[3] *Evidence – Books of account – Whether corroborated – Evidence Act, s. 32 (Cap. 43) (U.).*

[4] Partnership – Contract – Liability of former partner for debts incurred after withdrawal – Partnership Act (Cap. 56), s. 40 (U.).

Editor's Summary

The plaintiff sued the defendants as partners in a firm for goods sold and delivered in 1967. The plaintiff produced its books of account, evidence of their correctness and dishonoured cheques given by the first defendant. The second defendant had retired from the partnership on 1 January 1967, but notice of this was not gazetted, nor was the retirement notified to the Registrar of Business

Names for ten months thereafter. The second defendant contended that he was not sued as a partner, that the sale and delivery had not been proved, and that he was not liable for debts incurred after he left the partnership.

Held –

- (i) the second defendant was sued as a partner in the firm in respect of partnership debts;
- (ii) even if this were not fully clear from the plaint, it was a want of form to which objection could not be taken;
- (iii) the entries in the plaintiff's books of account were corroborated and so could be accepted as correct;
- (iv) as the second defendant had been introduced to the plaintiff as a partner in the firm express notice of his withdrawal was necessary and as this was never given the second defendant was liable.

Judgment for the plaintiff.

Cases referred to in judgment:

- (1) *Pillani v. Motilal* (1929), 45 T.L.R. 283.
- (2) *Phakey v. World Wide Agencies Ltd.* (1948), 15 E.A.C.A. 1.
- (3) *Tower Cabinet Co. Ltd. v. Ingram*, [1949] 1 All E.R. 1033.

Judgment

Phadke J: The plaintiff, Rambhai & Company (Uganda) Ltd. (hereinafter referred to as “the company”) carries on the business of hardware and general merchants in Kampala. Each defendant is described as a “Building Contractor” and both are described as “trading under the name and style of ‘Mistry Lalji Ratna & Co.’ at Kampala”.

Paragraph 2 of the plaint reads:

“The Defendants were carrying on business in partnership under the firm name and style of ‘Mistry Lalji Ratna & Co.’ at Plot No. 15, Namirembe Road, Kampala, at all times relevant to this action.”

The Company claims the sum of Shs. 16,536/15 being the price of goods allegedly sold and delivered to “the Defendants at the Defendants’ special instance and request at Kampala during the year 1967”. A statement of account attached to the plaint shows the sum of Shs. 6,617/95 as “Account rendered June 1967” and the sum of Shs. 9,918/20 in respect of the months of July and August 1967. Particulars are also attached of the “Account rendered” (Shs. 6617/95) and for July (Shs. 7581/35) and August (Shs. 2530/35), 1967.

In the prayer for judgment, the company claims the total sum of Shs. 16,536/15, with interest and costs, “jointly and severally” against both defendants.

Paragraph 4 of the plaint alleges that towards payment of the company’s claim the defendants gave to the company two cheques, for Shs. 7,581/15 and Shs. 6,167/95, payable on 20 August 1967 and 20 September 1967 respectively, but these cheques were dishonoured on presentation on due dates.

The two cheques in question, which were produced at the hearing show that they were drawn by Mistry Lalji Ratna & Co., and signed by “L. R. Patel” as Director, and that upon dishonour were returned to the company with the remark thereon – “Payment stopped by the drawer”.

I have considered it necessary to refer at some length to the contents of the plaint as counsel for the second defendant has made certain submissions with

regard to the form of the plaint, which submissions I will deal with later in this judgment.

The plaint was filed under the Summary Procedure Order 33 of the Civil Procedure Rules. It is dated 12 December 1967, but it appears from the court file that it was not filed in court until 22 December 1967. It is common ground that before the filing of the plaint on 15 December 1967 a Receiving Order in bankruptcy was made against the first defendant on his own petition and the Official Receiver was appointed the Receiver of the debtor's estate. The summons issued to the first defendant was served upon the Official Receiver who, in due course, admitted on behalf of the debtor's estate, the company's claim to rank for dividend in the bankruptcy. On 14 February 1968 an order to this effect was made by consent, by the Deputy Chief Registrar.

When the summons was served upon the second defendant he applied for leave to appear and defend the suit against him. On 3 April 1968 he was given leave by consent, and thereafter filed his written statement of defence.

In his written statement of defence, the second defendant denies the company's allegation that at all times material to the action he was a partner of the first defendant in "Mistry Lalji Ratna & Co.", and denies that he or any person with his authority received goods from the company as alleged. He denies having had any dealings with the company in respect of "Mistry Lalji Ratna & Co.", and further denies that he has drawn any cheques in favour of the company as a partner of "Mistry Lalji Ratna & Co.", or otherwise.

In respect of the plaint, counsel for the second defendant submitted with much insistence that the company's claim as stated therein is a claim, jointly and severally, against the two individuals named as the first defendant and the second defendant, and that the description given in the heading of the plaint – viz. "Both trading under the name and style of 'Mistry Lalji Ratna & Co.'" – being no more than a description, does not in any way qualify the real nature of the claim, namely a suit against two named individuals. Counsel for the second defendant submitted that the company had to prove that the second defendant or some person with his authority requested the company to deliver and that the company delivered goods to him, and that it was the second defendant who gave to the company the two cheques referred to above. It was submitted by counsel for the second defendant that the company could not go beyond its pleading in the plaint, and in the event of the Company failing to adduce satisfactory proof against the second defendant upon the matters contended by him, the company's claim against him was bound to fail.

I have given careful consideration to counsel for the second defendant's submission but I am unable to agree with it. The heading of a plaint is an integral part of the plaint (see *Phakey v. World Wide Agencies Ltd.* (1948), 15 E.A.C.A. 1) and the heading of this plaint does indicate that the two defendants are sued as persons trading under the name of "Mistry Lalji Ratna & Co." Further, paragraph 3 of the plaint states that the two defendants were at all times relevant carrying on business in partnership under the firm name or style of "Mistry Lalji Ratna & Co." In my opinion, the company's claim as set out in the plaint should be construed as an action against both defendants, not as two separate and unconnected individuals but as partners in the said firm of "Mistry Lalji Ratna & Co." The two cheques referred to above also indicate that the company's dealings were with the said firm and not individually with the two defendants. If at all there is any defect of form in the plaint, I consider that the provision in O. 6, r. 16 of the Civil Procedure Rules which says that "no technical objection shall be raised to any pleading on the ground of any alleged want of form" is applicable in the instant case.

Consequently I hold that the company's claim against both defendants is in

respect of the value of goods allegedly sold and delivered to the firm named “Mistry Lalji Ratna & Co.” (which is hereinafter referred to as “the firm”), and that upon the pleadings the two undermentioned issues arise for decision:

Issue No. 1. Did the company sell and deliver to the firm goods of the value of Shs. 16,436/15 as alleged?

Issue No. 2. In respect of the company’s alleged claim, is the second defendant liable to the company, in his capacity as a partner in the firm?

I consider that it will be convenient to deal with those issues by separating the evidence in relation to each.

Issue No. 1

Mr. Manubhai Chaturbhai Patel, a director of the company, testified that although his work in the company is not that of a salesman he had knowledge of the fact that the company had dealings with a firm named “Mistry Lalji Ratna & Co.” The company sold building materials to this firm on terms of thirty days’ credit. In June 1967, goods of the value of Shs. 6,894/- were sold and delivered. Allowance was made for a credit balance of Shs. 276/05 carried forward from May 1967, and so the net amount due to the company at the end of June 1967 was Shs. 6,617/95. He produced the relevant duplicate invoices in the company’s bound invoice books. In July 1967, goods of the value of Shs. 7,581/35 were sold and delivered and the witness produced the relevant duplicate invoices. In August 1967, goods of the value of Shs. 2,530/05 were sold and delivered and he produced the relevant duplicate invoices. All these duplicate invoices were admitted as exhibits for identification, and each invoice bore the signature of the person who received the goods in question. The witness stated that the original invoices were posted to the firm and at the end of each month a statement of account, accompanied by duplicate invoices, was sent. There had been no disputes about these invoices.

He produced the two dishonoured cheques. The value of these two cheques was Shs. 14,199/30 which was equivalent to the company’s claim for the value of goods sold and delivered in June and July 1967, but not in August 1967.

In cross-examination he agreed that he had no direct personal knowledge of the sale and delivery of the goods and could only refer to the invoices.

Mr. H. D. Pandya, the Deputy Official Receiver, testified, in answer to the court, that the company’s claim was admitted to rank for dividend in the bankruptcy of the first defendant after it had been checked and found to be correct according to the debtor’s statement and his books of account.

Counsel for the second defendant submitted that upon the evidence the company had wholly failed to prove that goods had been sold and delivered as alleged. The only evidence adduced by the company was the production of several duplicate invoices by a witness who had no direct personal knowledge of the alleged dealings. No evidence had been adduced from persons having personal knowledge of the same. He referred to s. 32 of the Evidence Act (Cap. 43) and to the Indian case of *Mukundram v. Dayaram*, I.L.R. 10, Nagpur L.R. 44 – decided by reference to the parallel s. 34 of the Indian Evidence Act. A report of that case is not available but the following extract from the judgment is quoted in *Sarkar on Evidence* (11th Edn.), at p. 422:

“There is frequently a confusion in the subordinate courts as to how an account book should be proved under s. 34 aforesaid. It is common practice to call a witness and examine him, as to the particular item sought to be proved, by getting him, as it were, to read them out to the court, sometimes when he had no personal knowledge concerning them and they are not in his handwriting; meanwhile it is taken for granted without

formal proof that because the book is the 'Khata' or 'rokar' of some firm, it is regularly kept. The question whether or not a book is regularly kept is one of fact, to be proved (if not admitted) according to the circumstances of each case."

The legal provision contained in s. 32 of the Evidence Act, that entries in books of account regularly kept are not by themselves and without corroborative evidence sufficient to establish liability thereunder, is one which is abundantly clear and beyond controversy. No particular form of books of account is prescribed. In my opinion, the bound duplicate invoice books produced in this case should be treated as books of account because each invoice contains entries which are not a mere memorandum for some other purpose but are a record of items which create a liability in an account between the parties. The invoices are duplicates of the company's day to day transactions of sale of goods to customers and are contained in bound books regularly used for the purpose, and the bound books have an honest appearance. The legislature does not require any particular form of evidence in addition to the entries in books of account and any relevant fact which can be treated as evidence within the meaning of the Evidence Act would be sufficient corroborative evidence. Such evidence may take the shape of vouchers, receipts or other documentary evidence or of sworn testimony.

In this case, having held earlier that the company's claim against the two defendants must be construed as arising from dealings with the firm, I find that the sworn oral testimony of Mr. H. D. Pandya as to the correctness of the company's claim, and the documentary evidence furnished by the two dishonoured cheques sufficiently corroborate the entries in the company's books of account.

I therefore hold that the company has proved that goods of the value of Shs. 16,535/15 were sold and delivered by the company to the firm in the months of June, July and August 1967, as alleged in the plaint.

Issue No. 2

Mr. George William Mukubi, a clerk in the High Court Registry, produced the court file of Bankruptcy Cause No. 12 of 1967, entitled Lalji Ratna, trading as Mistry Lalji Ratna & Co. – Debtor. From the papers in this file he identified the Receiving Order dated 15 December 1967, the Adjudication Order dated 26 January 1968 and the Preliminary Statement of the debtor before the Deputy Official Receiver on 18 December 1967 which contained, inter alia, the following statements:

Paragraph 3 –"In May 1966 one Dhanji Ramji and I became partners and started a new firm under the name of Mistry Lalji Ratna and Company. I had no capital to put in this business but my partner lent the necessary capital to the Firm. I believe my partner contributed approximately Shs. 60,000/-. This capital was largely used to help finance the first building contract which was offered to our firm."

Paragraph 4 –"My partner Dhanji Ramji retired from the firm in January 1967."

This witness also identified the court record of the Public Examination of the debtor. This record contains, inter alia, the following:

"In May 1966 Dhanji Ramji became my partner in a business known as Mistry Lalji Ratna & Company. Ramji retired in January 1967 and I became the sole partner in the business."

Mr. Manubhai Chaturbhai Patel, a director of the company, testified that the firm had two partners – Lalji Ratna and Dhanji Ramji. A letter of demand

was sent, through an advocate, to the firm but not individually to Lalji Ratna. Lalji Ratna became bankrupt.

In cross-examination he stated that when the suit was filed he did not know that Lalji Ratna had become a bankrupt. Before 1 June 1967 the company had begun to sell goods to Mistry Lalji Ratna & Co. He knew who were the partners in this firm because in May 1966 Lalji Ratna had come to him with Dhanji Ramji and introduced the latter as his partner. This was the only source of his information. The company had caused enquiries to be made at the Registry of Business Names but before filing the suit did not make enquiries about any changes. The company's advocate gave the information that as from 1 January 1967 Dhanji Ramji was not a partner in the firm. Until the advocate gave this information he did not know that Dhanji Ramji had ceased to be a partner. Lalji Ratna and his son visited him very often but they never informed him that Dhanji Ramji had retired from the partnership after 31 December 1966. He denied the suggestion that he was making up the story of meeting Dhanji Ramji in May 1966.

Mr. H. D. Pandya, the Deputy Official Receiver who is also the Assistant Registrar of Business Names, testified that the firm named Mistry Lalji Ratna & Co. was registered on 19 May 1966. The partners were Lalji Ratna and Dhanji Ramji. He produced a certified photostat copy of the Statement of Particulars dated 19 May 1966 signed by both partners. On 20 November 1967 a Notice of Change in Particulars, dated 17 November 1967, was filed. This stated that –"Dhanji Ramji retired from the partnership as from 1st January 1967 and Lalji Ratna took over the assets and liabilities from that date."

In cross-examination he referred to the Receiving Order; and to the Adjudication Order which bears the heading –"Lalji Ratna Patel, t/a Mistry Lalji Ratna & Co." He questioned Lalji Ratna about the constitution of the firm and recorded the debtor's Preliminary Statement. He read out paragraphs 3 and 4 thereof which have been quoted earlier. The debtor confirmed the contents of these two paragraphs in his Public Examination.

The company did not file a formal Proof of Debt but only made a claim which he admitted to rank for dividend in the bankruptcy. The second defenant filed a Proof of Debt for Shs. 60,214/50, giving his name as Dhanjibhai Velji.

The debtor's estate had 34 creditors and none of them had at any time claimed that the second defendant was a partner of the debtor. He had no reason to believe that the second defendant was a partner.

The witness stated that when he gave evidence at Nairobi in Civil Case No. 1072 of 1967 in the High Court of Kenya he had produced a document written in Gujerati language, which he had found amongst the papers of the debtor. The document was now an exhibit in that civil case but he produced the duplicate copy thereof and its English translation. I consider it desirable to set out the text of this document.

“

MISTRY LALJI RATNA & CO.

Building and General Contractors

Transport Agents

Phone

Ref. No.

P.O. Box 3423,

Kampala.

Dated 7th January 1967.

We the undersigned Lalji Ratna and Dhanji Ramji agree today as under: –

- (1) With effect from 1st January Dhanji Ramji has retired from the above

firm (Mistry Lalji Ratna & Co.), and Lalji Ratna has become the proprietor of the firm.

- (2) The accounts of the firm till 31.12.66 are to be completed and both should bear equally in the profits and loss.
- (3) That Lalji Ratna is responsible for all transactions effected by the firm after 1st January, and also he will take the profits.
- (4) Lalji Ratna undertakes to make payment of the amount which Dhanji Ramji has invested in the firm, after making the accounts for the year 1966 and ascertaining the amount to his credit.
- (5) Plot No. 267, Albert Cook Road has been transferred to Dhanji Ramji at the time he retired from (the firm) and Dhanji Ramji will be the owner of the plot.

(sgd.) DHANJI RAMJI

(sgd.) LALJI RATNA”

The witness stated that under s. 8 of the Business Names Registration Act (Cap. 87) the period of 14 days is prescribed for filing notification of change, and s. 10 prescribes the disabilities whilst the default continues. A late filing fee is always imposed.

Dhanji Ramji, the second defendant, testified that he is now known as Dhanji *Velji*. Formerly he used his uncle's name “Ramji” in place of that of his father “Velji” because he came out to East Africa as an adopted son of his uncle Ramji.

From May 1966 to 31 December 1966 he was a partner of Lalji Ratna. He retired from the partnership on 1 January 1967, and both signed a document. His principal place of business is in Nairobi, and he used to visit Kampala occasionally. He did not know the company's director (Mr. M. C. Patel) who had earlier given evidence and had never before even seen him. He had never been to the company and represented to Mr. M. C. Patel that he was Lalji Ratna's partner. No-one had authority to pledge his credit, and he had not drawn any cheques in favour of the company. He had not personally received any notice of dishonour of the cheques or a demand for payment.

Lalji Ratna was to file the Notice of Change with the Registrar of Business Names. In November 1967 he learnt that Lalji Ratna had not done so and so he himself filed the notification and paid the penalty.

In cross-examination, he denied that the document was a faked document and that a faked document had been drawn up because Lalji Ratna was about to become a bankrupt. He had been engaged in the building trade for 13/14 years and knew that Rambhai & Co. have a hardware shop in Nairobi but he did not know the situation of the company's premises in Kampala, and he had never met Mr. M. C. Patel.

He had changed his name by deed poll on 1 November 1966 at the instance of his uncle Ramji. He denied that the change was made in order to confuse creditors. He agreed that he did not advertise in the Uganda Argus or in the Gazette his retirement from the partnership. Lalji Ratna may have done so because it was he who was to deal with the matter. A banking account of the firm was opened and he had authority to sign cheques but in December 1966 he stopped signing cheques.

Mr. Khanna submitted that the document was not a faked document and clearly showed that the second defendant had ceased to be a partner as from 1 January 1967. Therefore the second defendant could not be held liable for the firm's indebtedness to the company incurred after that date. Late notification is an offence under the Business Names Registration Act and disabilities

are prescribed whilst the default continues but this does not mean that in law the second defendant did not cease to be a partner until actual registration of the Notice of Change.

Counsel for the company submitted that the document is not binding upon the company, and under s. 40 of the Partnership Act (Cap. 86) the second defendant is liable to the company as a partner in the firm.

Counsel for the second defendant, in reply, submitted that s. 40 of the Partnership Act cannot apply as the section provides for a situation where there is a continuous account whereas the account as disclosed in evidence was for the period of three months, namely June, July and August 1967, after the retirement of the second defendant from the partnership on 31 December 1966.

I have carefully considered the foregoing evidence, and I make the following findings of fact giving my reasons wherever necessary.

- (1) It is not in dispute that the two defendants became partners in the firm on 12 May 1966.
- (2) It is not in dispute that the second defendant invested Shs. 60,000/- in the capital of the firm but Lalji Ramji did not invest any money.
- (3) I accept as truthful the evidence of Mr. M. C. Patel that Lalji Ratna and the second defendant met him in May 1966 when Lalji Ratna introduced the second defendant as his partner. I reject as untrue the evidence of the second defendant that he had not met Mr. M. C. Patel and had never before even seen him, because I consider it most improbable that the second defendant, a builder of many years' experience, who had invested Shs. 60,000/- in the firm, could be so indifferent towards the business affairs of the firm as not to meet the director of the concern which supplied building materials to the firm on credit.
- (4) The document is not binding upon the company, and as such I do not consider it necessary to make any finding as to its genuineness or otherwise.
- (5) It is not in dispute that the retirement of the second defendant from the firm was not notified to the Registrar of Business Names until 20 November 1967 – about 10 months later than the period prescribed by law.
- (6) It is admitted by the second defendant that his retirement from the Firm was not advertised in the Uganda Argus or the Gazette.

Upon the findings of fact stated above, the answer to this issue is to be sought by reference to the law relating to partnerships, viz. The Partnership Act (Cap. 86). Section 40 reads:

- “(1) Where a person deals with a firm after a change in its constitution he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change.
- (2) An advertisement in the Gazette shall be notice as to persons who had not dealings with the firm before the date of the dissolution or change so advertised.
- (3) The estate of a partner who dies or becomes bankrupt or of a partner who not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts after the date of the death, bankruptcy or retirement respectively.”

This section is identical with s. 36 of the English Partnership Act 1890 and its interpretation was discussed in the decision of the English Court of Appeal in *Tower Cabinet Co. Ltd. v. Ingram*, [1949] 1 All E.R. 1033. According to my understanding of the judgments in that case, the following propositions of law are enunciated therein:

- (1) The words “apparent members” appearing in sub-s. (1) mean all members apparent to the person dealing with a firm.
- (2) The apparent members may be apparent either by the fact that a person has had dealings with them before or by indirect information or by direct communication.
- (3) No notice of retirement is necessary in order to prevent a partner, who is not known to the person dealing with a firm to have been a partner, from becoming liable for debts contracted after his retirement.
- (4) If a person dealing with a firm had no knowledge prior to the dissolution that the retiring partner had been a partner, the retiring partner is relieved from liability.

As regards sub-s. (2) which also deals with cases of apparent members (per Lynskey, J., in *Tower Cabinet Co. Ltd. v. Ingram* (supra), at p. 1037) the wording is very clear. Notice in the Gazette is sufficient notice in the case of persons who had no dealings with the firm before the date of the dissolution or change. In the case of those who had such dealings notice in fact must be proved (*Pillani v. Motilal* (1929), 45 T.L.R. 283).

In my respectful view, the above mentioned propositions are reasonable and I propose to follow them in applying the provisions of s. 40 of the Partnership Act to the facts of this case as found by me. In so doing, I am fortified by the provision in s. 49 which states that all rules of equity and common law applicable to partnerships in England shall be deemed to apply to partnerships in Uganda except in so far as they are inconsistent with the provisions of the Act.

Having held as a fact that the second defendant was introduced to Mr. M. C. Patel as a partner in the firm, I now further hold that as the result of this direct communication the second defendant was to the company an apparent member of the firm. I accept as truthful the evidence of Mr. M. C. Patel that Lalji Ratna and his son who visited him very often never informed him that the second defendant had retired from the firm after 31 December 1966. I hold that in the absence of actual notice to the Company under s. 40 (1) the company was entitled to treat the second defendant as still being a member of the firm.

Section 40 (2) does not apply to the facts of this case, and in any case it is admitted by the second defendant that his retirement was not advertised in the Gazette. Likewise, s. 40 (3) does not apply.

Therefore, on this issue I hold that the second defendant is liable to the company as a partner in the firm.

In the result, I enter judgment in favour of the company against the second defendant for Shs. 16,536/15 with interest as claimed, and the costs of this suit.

Judgment for the plaintiff.

For the plaintiff:

J. K. Patel

For the defendant:

D. N. Khanna and M. C. Patel (instructed by *Manubhai Patel & Son*, Kampala)

Welch v Standard Bank Limited

[1970] 1 EA 115 (HCK)

Division: High Court of Kenya at Nairobi
Date of judgment: 4 July 1969
Case Number: 1090/1968 (157/69)
Before: Madan J
Sourced by: LawAfrica

[1] Negligence – Collision – Straight road – No evidence as to which driver was to blame for an accident – Whether both drivers were innocent or equally to blame.

Editor's Summary

Two vehicles collided when travelling in opposite directions on a main dry road 23' 8" wide at night. The vehicles hit each other on the right front side. Oil, broken glass, and mud were found in the centre of the road. No significance could be attached to the final stopping position of each vehicle due to each vehicle having slewed and turned at least a half circle each. Both drivers were killed and there were no witnesses or skid marks.

No safe inference could be drawn as to the path taken by each vehicle before impact and the speed of each vehicle was unascertainable.

It was for decision whether the Court should conclude that no negligence was proved against either driver or that the fact of the collision on a main dry road postulated negligence on someone's part.

Held – Both drivers were equally to blame for the accident.

Cases referred to in judgment:

- (1) *Briginshaw v. Briginshaw* (1938), 60 C.L.R. 336.
- (2) *Baker v. Market Harborough Industrial Co-operative Society Limited*, [1953] 1 W.L.R. 1472.
- (3) *L. J. Davison v. Laggett*, Times Newspaper, 8 May 1969.

Judgment

Madan J: On the night of 28 August 1967 a Volvo which at the time was being driven by Terence Campbell Welch along the Ngong Road from Ngong in the direction of Dagoretti Corner collided with a Mini Cooper being driven in the opposite direction by one A. J. N. Barraclough. Both drivers were killed in the accident which happened on a dry road 23' 8" wide. There were no witnesses.

Inspector Kyanzi from Nairobi Traffic Headquarters who arrived at the scene soon afterwards formed the opinion that the two cars did not appear to have been disturbed after the accident. Before they were removed, he prepared a sketch plan on the spot. Photographs of the scene were also taken, and some more the next morning, showing the two cars and the debris. No skid marks were to be seen on the road.

There was a thick patch of oil in front of where the Volvo had come to a stop; some more had spread about three feet in front of it and broken glass and mud was found lying at or around this point. The distance from the middle of the Volvo to edge of the road on the opposite side was 11' 3". The Volvo came to a stop on its wrong side at nearly right angles to the road with its bonnet seven inches on its correct side across the road.

The Mini ran into a bus stop sign where it came to a halt 16' 7" away from the edge of the tarmac on its own side.

The alcohol content (ethanol) in the blood of the deceased Welch was found to contain the equivalent of 2 1/2 pints of beer or five whiskies which, to quote from the post-mortem report, had been consumed on a "stomach very full". No alcohol was detected in deceased Barraclough's blood sample.

This is the sum total of the data upon which the court is called upon to decide where the liability for the collision should lie.

In the absence of any evidence whatever about the manner of his driving, and the alcoholic content in his system by itself not being so high as to justify an adverse inference being drawn against him, it would be totally unsupportable to hold that the ability of the deceased Welch to drive properly at the time of the collision was impaired due to drink.

No particular significance can also be attached to the final position of the two cars after the impact for they clearly slewed and turned at least a half circle each to come to a stop where they did. Who can tell!

The right front sides of both cars are quite bashed in as shown in the photographs. Is it due to what has been described as an angled collision between the two vehicles? This hypothesis makes it impossible to place them in their final position after the impact, or so I think, for in such event the Volvo would have more likely veered on its own side unless it turned at least one and a half circles.

Inspector Kyanzi was of the opinion that the two cars ran straight into each other though the whole front of one did not run into the whole front of the other. He assumed the point of impact to be where he found the heavy patch of oil, broken glass and mud. On that basis, his is a sound enough theory. It is within experience that broken glass falls, mud from a car drops and oil runs out to form a heavy patch at the point of impact. Assuming this to be correct, it cannot still be definitely stated along what path on the road each car was travelling for both motor dynamics and their final positions tell that they were spun about.

Speculation, more speculation; so much to speculate on.

Notwithstanding that the accident probably occurred because of negligence on the part of one or the other or both drivers, there are no means to enable a choice to be made between these possibilities so that it may be said, not as mere conjecture but with a degree of assurance acceptable to a tribunal acting judicially, that as a proper inference one of these alternatives is the correct answer in fixing the blame for the collision. The court's dilemma is there is nothing to enable it to say the accident happened in some particular way. There are no witnesses, no marks on the road, no data to strike a balance of probabilities, no usual conflict of expert evidence, no expert evidence, no evidence at all; nothing, save only speculative inferences to be gleaned from the indecisive mute testimony of the damage to the two cars or from the measurements shown in the sketch plan of the scene.

In this dilemma should the court surrender its functional duty of determining the controversy by taking an easy way out and telling the parties the action must fail for lack of probative material; or, should it say because a collision does not normally take place without negligence on someone's part, it is incumbent that the court perform its operative task by reaching a decision notwithstanding, as Dixon, J., expressed it in the High Court of Australia in *Briginshaw v. Briginshaw* (1938), 60 C.L.R. 336 at p. 361, that the truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found.

I think, if adopted, Dixon, J.'s view, prettily phrased though it is, would result in an abdication of the court's functional duty. It fails to take account of the fact that when there is no material to generate actual persuasion in the court's mind, still the court cannot unconcernedly refuse to perform its allotted task of reaching a determination.

The collision is a fact. Any one of the alternatives already mentioned may provide the right answer as to how it happened. The court's sense of impartiality prevents the choosing of the alternatives of individual blame against either driver. It would be just to say, and it is as likely the explanation that both drivers were to blame equally as that only one of them was wholly to blame. Accidents do not happen; they are caused. It is an explanation which offers a solution of impartial practicability. This I think must be the ratio decidendi for the dictum of Denning, L.J., as he then was, in *Baker v. Market Harborough Industrial Co-operative Society Limited*, [1953] 1 W.L.R. 1472 at p. 1476, which had been quoted with approval by Sachs, L.J., in *Davison v. Laggett*, as recently as 7 May 1969 (The Times):

"Everyday, proof of collision is held to be sufficient to call on the two defendants for an answer. Never do they both escape liability. One or the other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence the court would unhesitatingly hold that both were to blame. They would not escape simply because the court had nothing by which to draw any distinction between them. So, also, if they are both dead and cannot give evidence enabling the Court to draw a distinction between them, they must be held both to blame, and equally to blame."

Denning, L.J., is not alone in the field. More than a century ago, an American judge expressed a similar view:

"We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."

The divergence of opinion between Dixon, J.'s active approach and Denning, L.J.'s accommodation approach, for that is what I think it is, is admirably expressed in the words written in the Preface to Robert E. Keeton's text-book titled *Legal Cause in the Law of Torts*:

"Two yearnings influence development of any legal rule. One is the yearning for a precise rule that serves as an unfailing guide to the judge in making decisions and to the lawyer in predicting them. The other is the yearning for a flexible rule that is most conducive to sensitively administered justice – a rule that never compels bad decisions in the interest of symmetry, elegance, or simplicity. The first yearning is an influence toward particularisation of the rule and rigid consistency of application; the second, toward generalisation and discretionary application."

Justice must not be denied because the proceedings before the court fail to conform to conventional rules provided, in its judgment, the court is able to discern that which is right owing to it being fair and just in the circumstances, without jeopardising the vital task of doing justice. Provided there is no transgression of this sacred duty, the court will act justly in coming to a decision even if there is no evidence capable of procreating actual persuasion.

There being nothing to enable the court to draw a distinction between the two drivers, it is consonant with probabilities, and it is not repugnant aesthetically to a logical judicial mind, to hold that both were to blame, and equally to blame. This court does so hold in this case.

For the plaintiff:

W. S. Deverell (instructed by Kaplan & Stratton, Nairobi)

For the defendant:

P. Le Pelley (instructed by Hamilton Harrison & Mathews, Nairobi)

Kiragu v Republic
[1970] 1 EA 118 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	29 October 1969
Case Number:	269/1969 (160/69)
Before:	Mwendwa CJ and Simpson J
Sourced by:	LawAfrica

[1] Criminal Practice and Procedure – Jurisdiction – District Magistrate – No power to convict of handling stolen property – Penal Code (Cap. 63), s. 322 (K.).

Editor's Summary

The appellant was charged before a District Magistrate with housebreaking and theft. The magistrate found that he was guilty of handling stolen property contrary to the Penal Code, s. 322, he convicted him and remitted him to the Resident Magistrate, Nakuru, who sentenced him to seven years imprisonment with hard labour, the minimum sentence.

Held –

- (i) a District Magistrate had no power to convict under s. 322, Penal Code;
- (ii) where a District Magistrate is satisfied that the accused is not guilty of theft but of handling stolen property, he can only acquit the accused.

Appeal allowed.

No cases referred to in judgment.

Judgment

The judgment of the court was read by **Mwendwa CJ**: The appellant was charged with housebreaking contrary to s. 304 and stealing contrary to s. 279 of the Penal Code.

From the particulars of the offence it is apparent that the relevant sections should be ss. 304 (1) (a) and 275.

The magistrate however convicted the appellant under s. 322 of the Penal Code being satisfied that he “was found in possession of stolen property” and in view of his previous record committed him to the Resident Magistrate, Nakuru, for sentence. He was subsequently sentenced to seven years imprisonment with hard labour, the minimum sentence provided by s. 322 of the Penal Code.

The appellant now appeals against both conviction and sentence.

This case illustrates one of the anomalies created by the Criminal Law Amendment Act 1969.

Under s. 188 of the Criminal Procedure Code a person charged with stealing may if the facts proved amount to an offence under s. 322 of the Penal Code be

convicted of an offence under that section, a useful provision frequently relied upon.

The magistrate in this case however was a District Magistrate, Class II, who has jurisdiction to try offences of housebreaking and stealing contrary to ss. 275, 279 and 304 of the Penal Code.

By virtue of the provisions of the Criminal Law Amendment Act 1969, namely s. 9 (2) and the Second Schedule, offences under s. 322 may be tried only by a Resident Magistrate.

A District Magistrate no longer has jurisdiction to convict under that section and where he is not satisfied that the accused is guilty of stealing but is satisfied that an offence under s. 322 has been proved he must nevertheless record an acquittal.

It may be added that if in such a case the accused is then tried by a Resident Magistrate for an offence of handling stolen property under s. 322 of the Penal Code and the Resident Magistrate comes to the conclusion that the accused is the thief he cannot convict him of stealing not only because there is no provision in the Criminal Procedure Code authorising him to do so but also because the accused could plead *autrefois acquit*.

The conviction in the present case is a nullity and the appeal is allowed. The finding of the District Magistrate is reversed, and the sentence imposed by the Resident Magistrate is set aside. The appellant is discharged.

Appeal allowed.

The appellant was absent and unrepresented.

For the respondent:

Miss Barros-D'Sa (State Counsel)

Republic v Wamwari
[1970] 1 EA 119 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	29 October 1969
Case Number:	725/1969 (161/69)
Before:	Mwendwa CJ and Simpson J
Sourced by:	LawAfrica

[1] *Criminal Law – False claim by person in public service – Whether knowledge of incorrectness of claim sufficient – Penal Code (Cap. 63), s. 100 (K.).*

The respondent was accused of submitting a false claim by a person employed in the public service by returning a larger sum than she actually paid as board and lodging on her claim for housing allowance. She gave sworn evidence that she wanted to receive the amount to which she was entitled, and the magistrate held that she did not know the claim was false although it was a wrong claim. On appeal by the Republic.

Held – as the respondent knew that a statement on her claim was incorrect she was guilty of making a false claim.

Appeal allowed. Respondent convicted and conditionally discharged.

No cases referred to in judgment.

Judgment

The judgment of the court was read by **Mwendwa CJ**: This is an appeal by the Attorney-General under the provisions of s. 348A of the Criminal Procedure Code.

The respondent was charged with the following offence:

“False claim by a person employed in the public service, contrary to section 100 of the Penal Code.

Lilian Wamwari Njeru: Between 21 June 1968 and 30 June 1968, at Nairobi in the Nairobi area, being a person employed in the public service, namely as a clerk with the Ministry of Economic Planning and Development in such capacity as to require her to furnish statements touching any sum payable or claimed to be payable to herself, made a statement in a claim for Non pensionable House allowance (Form H.C.1) touching such sum as aforesaid, namely, payment of house allowance to herself which was to her knowledge false in a material particular in that she stated that she paid Shs. 250/- per month as inclusive terms for board and lodging to the Y.W.C.A. Hostel, Ofafa.”

There is evidence which appears to have been accepted by the magistrate that the accused who was at the time a public servant completed a claim for non-pensionable house allowance in which she certified that she was living at the Y.W.C.A. Hostel, Ofafa and paying inclusive terms for board and lodging at the rate of Shs. 250/- per month. She handed this to Kinyungu a clerk in the Personnel section of the Ministry of Finance and was subsequently paid a house allowance based on this figure.

The matron of the hostel at the relevant time said the accused paid Shs. 145/- per month for breakfast and supper, board and lodging. The accused did not take lunch at the hostel. If she had done so she would have paid an extra Shs. 26/- per month only.

Giving sworn evidence, the accused said she just wanted to receive the amount to which she was entitled and admitted that the amount she entered in the claim was not the amount she was paying to the Y.W.C.A.

In acquitting her on this charge the magistrate said:

“The documents which the accused handed to Kinyungu were not false. Hence counts four and five (the count now under consideration) cannot succeed. The accused genuinely thought her claim was valid and she persuaded the officials to approve. The accused did not know that the claim for Shs. 250/- was false although it was a wrong claim. The fifth count fails.”

The evidence clearly establishes that the statement in the accused’s claim that she paid Shs. 250/- inclusive terms for board and lodging, a material particular was false and known by the accused to be false.

The finding that the accused did not know that the claim for Shs. 250/- was false is one which the magistrate could not have made had he given full and proper consideration to the evidence including in particular the accused’s own admission.

What the accused thought she was entitled to is moreover entirely irrelevant.

There must be few public servants who have not at one time or another disapproved of the regulations governing, or disagreed with the official view concerning their entitlement to an allowance. This cannot however in any circumstances justify the making of a false statement in order to obtain what they consider to be the proper entitlement.

The Deputy Public Prosecutor has informed us that the Republic is concerned only with obtaining a ruling by the High Court on the correct position in law for the benefit of subordinate courts and is not interested in punishment of the respondent.

The appeal is allowed.

For the acquittal by the subordinate court on this count we substitute a conviction and discharge the accused subject to the condition that she commits no offence during the period of six months from the date of this order.

We think it hardly necessary to add that the granting of a conditional discharge in this case should not be regarded as in any way indicative of our views on the seriousness of this offence.

Appeal allowed.

For the appellant:

J. R. Hobbs (Deputy Public Prosecutor)

The respondent appeared in person.

Patel and others v National & Grindlays Bank Ltd
[1970] 1 EA 121 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	27 November 1969
Case Number:	33/1969 (164/69)
Before:	Sir Charles Newbold P, Duffus VP and Fuad J
Sourced by:	LawAfrica
Appeal from:	The High Court of Uganda – Dickson, J.

[1] *Guarantee – Discharge – Of guarantor – By variation made in arrangement between creditor and principal debtor without guarantor’s consent – Bank opening further account for principal debtor.*

[2] *Guarantee – Discharge – Of guarantor – Variance of terms of contract without surety’s consent – Whether guarantor discharged from all liability or from liability subsequent to variance – Indian Contract Act 1872, s. 133.*

[3] *Statute – Construction – Intention to alter common law.*

Editor’s Summary

The three appellants guaranteed the accounts of a company with the respondent. One of the guarantees

was signed before 1 January 1963 and so was subject to the Indian Contract Act 1872, and the others were signed afterwards. After the third appellant ceased to be the managing agent of the company the respondent opened a new account for the company through which further advances were made.

In the High Court the appellants pleaded that they were discharged from their guarantees by the opening of the new account, and that there was an agreement that the appellants would not be liable for advances made subsequent to the termination of the third appellant's managing agency.

The trial judge found that the appellants were not discharged from their guarantees and the appellants appealed.

Held –

- (i) (by the court) there was no agreement under which the guarantees ceased to be continuing guarantees;
- (ii) (Sir Charles Newbold, P., and Fuad, J., Duffus, V-P., dissenting) the appellants were discharged from their guarantees by the action of the respondent in opening a new account for the debtor without their consent;

- (iii) (Sir Charles Newbold, P., and Fuad, J., Duffus, V-P., dissenting) the Indian Contract Act 1872, s. 133 is not intended to alter the common law and does not retain any liability on the guarantor;
- (iv) (Duffus, V-P.) the guarantees allowed the respondent to open new accounts and this power was not confined to a time after the guarantees had ceased to be continuing securities.

Appeal allowed.

[**Editorial note:** The High Court decision of this case was reported at [1969] E.A. 403.]

Cases referred to in judgment:

- (1) *Clayton's case Devaynes v. Noble* (1816), 1 Mer. 529, 35 E.R. 767.
- (2) *Moholalbhai v. Setalwad* (1934), 62 I.A. 23.
- (3) *Nurdin v. Lombank*, [1963] E.A. 304.
- (4) *The National Bank of Nigeria Ltd. v. Awolesi*, [1964] 1 W.L.R. 1311.
- (5) *Harilal v. Standard Bank Ltd.*, [1967] E.A. 512.

Judgment

Duffus VP: The respondent, the National & Grindlays Bank Limited, obtained judgment against the three appellants Surendra Manibhai Patel, Manibhai Chhotabhai Patel, and Manibhai Chhotabhai Patel Ltd. as the guarantors of the account of Luvule Coffee Hullers Limited. The debtor, the Luvule Coffee Hullers Limited, carried on business as coffee growers and curers and the respondent bank advanced money for this purpose by way of an overdraft on its current accounts.

The three appellants guaranteed these advances by various written guarantees. The third appellant, a limited liability company, was also the managing agent of the debtor until 27 June 1964. The respondent bank instituted this action on 20 May 1965, and claimed the amount owing by the debtor up to the date on which the appellant company ceased to be the managing agent.

No action was taken against the debtor who continued to carry on its business with other managing agents – The African Coffee Auctioneers and Brokers Ltd. being so appointed. The respondent bank continued to make advances to the debtor but opened a new account for this purpose as from 29 June 1964 and the new managing agents, The African Coffee Auctioneers and Brokers Ltd., guaranteed this account. It is to be noted here that this new account was always in debit and although various amounts were from time to time lodged to the account, it never showed a credit balance.

The position of the debtor, however, under its new managing agents was, in so far as the respondent bank was concerned no better, and the overdraft greatly increased; to such an extent that on 15 December 1964 the respondent bank acting under its powers on debentures held from the debtor appointed a receiver. The result was that the debtor company was now run at a profit and the overdraft greatly reduced. The bank, however, kept the two accounts of the debtor separately – that is the account up to the date when the third appellant company ceased to be its managing agent, and the account as from 29 June, when the African Coffee Auctioneers and Brokers Ltd. became its managing agent. Both these accounts showed substantial overdrafts but the receiver acting on the respondent banks instruction used the profits

from his stewardship, to reduce the overdraft of the second account, that is the “African Agency Account”. This was reduced from Shs. 689,694/- to only Shs. 14,000/- at the

time of the trial. None of the profits made during the receivership of the debtor company were used to reduce the overdraft whilst the third appellant company were its managing agency although Mr. Keeble, the respondent's advocate in this appeal, states that if the receivership continues to make a profit, then this profit will be used, in due course, to reduce the amount of this judgment. The trial judge has, however, found as a fact that the overdraft of the account during the third appellant company's managing agency was reduced after the third appellant company had ceased to be the managing agents by the proceeds from the sale of coffee which had been purchased during its managing agency and was stock on hand at the time of the termination of its agency. This amounted to Shs. 218,747/-.

The appellants' substantive defence to this action was that they were discharged from the guarantee by the respondent's act in opening the new account with the debtor known as the "African Agency Account" without their consent as guarantors. It will be necessary to fully consider the provisions of the various guarantees in this case.

There are four guarantees. The first is dated 7 August 1959 and signed by the first and second appellants and also by a Mr. H. C. Patel, the first defendant in the plaint against whom the respondent bank discontinued at the start of the trial. The second guarantee is dated 9 July 1962 and was given only by the third appellant company, and so was the third guarantee dated 14 January 1963. The fourth guarantee dated 14 January 1963 was signed by Mr. H. C. Patel and also by the first appellant.

Prior to 1 January 1963 the Indian Contract Act 1872 applied to Uganda but by the Contract Act (Cap. 75) which came into force on 1 January 1963 it ceased to apply to Uganda except with regard to any agreement or contract made before that date. Section 3 (1) of the Contract Act provided:

- "(1) Save as may be provided by any written law for the time being in force and subject to the proviso to section 2 of this Act, the common law of England relating to contracts, as modified by –
- (a) the doctrines of equity;
 - (b) the public general statutes in force in England on the 11th August, 1902; and
 - (c) the Acts of the Parliament of the United Kingdom mentioned in the Schedule to this Act (to the extent and subject to the modification specified in that Schedule),

shall extend and apply to Uganda."

In so far as the first appellant is concerned, he signed the guarantee of 7 August 1959 but also signed that of 14 January 1963. Both of these guarantees covered identical advances except that the 1963 guarantee increased the guarantors liability to Shs. 2 ½ m. as against the Shs. 1 ½ m. in the 1959 guarantee. Mr. Gratiaen submitted that the 1963 guarantee superseded and replaced the 1959 guarantee and in my view this must be undoubtedly so. It has not been argued otherwise.

A similar position arises in so far as the third appellant company is concerned. Here again two guarantees were given, one for Shs. 1 ½ m. on 9 July 1962 and the other for Shs. 2 ½ m. in 1963. Both guarantees were identical except for the limitation of the amount of liability, and again, there can, in my view, be no doubt that the 1963 guarantee replaced the 1962 guarantee.

The position then with regard to the first appellant and the third appellant company is that the guarantees to be considered are those given on 14 January 1963, and the law to be applied is that set out in s. 3 of the Contract Act (Cap. 75),

that is the common law of England relating to contracts as modified by the section. The guarantees given by these two appellants are also in identical terms so that in this respect, these guarantees can be considered together.

The second appellant, however, only signed the guarantee of 7 August 1959 so that his liability will have to be considered in accordance with that guarantee and with the Indian Contract Act 1872.

All the appellants, however, guaranteed the same amounts and the facts established in this case apply equally well to all the appellants.

We have during the course of the hearing of this appeal had to criticise the pleadings in this case. The main purpose of pleadings is to arrive at the issue to be determined by the court and also to give the other side fair notice of the case which has to be met. In order to do this, each party must state the material facts relied on in order to prove or defend the claim. The advocates for both the appellants and the respondent in this action were fully satisfied that these pleadings clearly determined the issues, and they persuaded the judge to this view, so that no issues were framed in accordance with O. 12 of the Civil Procedure Rules. With respect I cannot agree with this view. The plaint appears to be correctly drawn as here the respondent bank states in clear language that it is suing under the various guarantees as set out to recover the amounts owing by the Principal debtor, Luvule Coffee Hullers Ltd. With respect though I cannot say the same with regard to the amended defence and counterclaim or to the reply. The main issue is, however, stated in paragraph 2 of the defence as follows:

“IN FURTHER OR ALTERNATIVE, the Defendants state that they are discharged under the guarantee by the act of the Plaintiff in opening fresh account of ‘Luvule’ known as ‘African Agency Account’ and opening various other Accounts and giving further credit to ‘Luvule’ without the Defendants’ consent and depriving the Defendants benefit of deposits made in ‘African Agency Account’ and other Accounts.”

Another of the issues that does arise in this appeal was also pleaded in the defence at paragraph (4) (h) as follows:

“IN FURTHER OR ALTERNATIVE, the Defendants state as follows: (h) On or about the 29th day of June, 1964 in consideration of the fourth Defendant at the request of the Plaintiff agreeing to refrain from in any way obstructing new managing agents appointed by the Coffee Company as a result of wrongful termination of the managing agency of the fourth Defendant with the Coffee Company, the Plaintiff agreed that the Defendants should not be liable under the guarantee in respect of any moneys subsequent to the said date and that the value of the stock held by the Coffee Company at the date of the said termination shall be deducted from the amount due under the guarantee to the Plaintiff by the Coffee Company.”

The respondent bank in its reply joined issue with the appellants on all matters.

On the pleadings the respondent bank based its case on the fact that the guarantees remained as a continuing guarantee although it only sought to recover the amounts due by the debtor up to the time when the third appellant company ceased to be the managing agents. In his opening address at the trial, counsel for the respondent made it clear that this was the position, the guarantees still in force, but the respondent bank not seeking to enforce its full rights against the appellants, but only to recover the amounts owed by the debtor company up to the date that the third appellant was its managing agent. How-

ever, in his closing address, and I might say here that the trial extended with adjournments over some three months, counsel for the respondent appears to have completely changed his views as to what were the facts on which he based his case, and his submission then was that by implication the guarantees had ceased to be continuing guarantees as from the time that the appellant company ceased to be the managing agent.

It is equally confusing that the appellants' advocate at the trial also completely changed his case on the facts from that which he had pleaded. Paragraph 4 (*h*) of the defence which I have set out is perfectly clear and this must be remembered is a statement of facts on which the defence were relying, and the appellants were there categorically stating that the parties had agreed that this should not be a continuing guarantee. Paragraph 4 (*h*) exactly states the case that the respondent bank eventually relied on, but in its reply the respondent bank joined issue with the defence and this joinder of issue operated as a denial of the facts stated at paragraph 4 (*h*), and nowhere has any evidence been led by either party to establish the facts set out in paragraph 4 (*h*). The appellants' advocate appears to have discarded this pleading at the trial and there most strenuously urged that these guarantees were, in fact, continuing guarantees. The apparent explanation of this "volte face" is paragraph 5 of the last three guarantees and the rather belated realisation of the parties or their advocates of its possible effect on the case. That is, in so far as the first and third appellants were concerned by probably nullifying their main defence that they were discharged as guarantors by the opening of the new account as this was specifically allowed by paragraph 5, and on the other hand an attempt by the respondent bank to rely on the provisions of paragraph 5 to justify the opening of the new account.

This must have been all very confusing to the trial judge. In his judgment the judge fully considered this question as to whether the guarantors had been discharged by the opening of a new account. I will refer here to passages from his judgment in which he arrived at the conclusion that the appellants were not discharged from the guarantees. I would first refer to that part of his judgment where he dealt with the consideration of the guarantees and said:

"Earlier, I referred to the submission of Mr. Keeble wherein he stated that a guarantor may consent in advance and it seems to me that paragraph 3 of the 1959 guarantee, and para. 8 of the other guarantees, where it is stated that the plaintiffs are at liberty without affecting their rights under the guarantee to determine or vary the amount of any credit to the debtor etc., gives the creditor a wide scope in dealing with the debtor without obtaining the immediate consent of the guarantors – the consent already having been given under the guarantees."

It would be convenient at this stage to also set out the paragraphs in the guarantees referred to by the judge. Paragraph 3 of the 1959 guarantee states:

"You may at any time or times determine, enlarge or vary any credit to the Principal and grant time or other indulgence to and enter into any composition or arrangement with the Principal or any other person without discharging or impairing this guarantee or any liability hereunder."

Paragraph 8 of the other three guarantees states inter alia:

"You are to be at liberty without thereby affecting your rights hereunder at any time or times until you shall have received the whole amount due or owing to you by the Debtor or so long as any part thereof shall remain unpaid by the Debtor to you to determine or vary the amount of any credit to the Debtor to vary exchange renew modify or release any securities or

guarantees held or to be held by you from or on account of the Debtor or in respect of the moneys hereby guaranteed to renew bills or promissory notes in any manner and to compound with give time for payment to accept compositions from and make any other arrangements with the Debtor or to from or with the under-signed or any of them (if more than one) or any obligants on guarantees bills notes or securities held or to be held by you from or on account of the Debtor or in respect of the moneys hereby guaranteed.”

I will further consider this question but it appears to me that the main point here, and also the difference between this case and the cases largely relied on by the appellants, *The National Bank of Nigeria Ltd. v. Awolesi*, [1964] 1 W.L.R. 1311 and that of *Harilal v. Standard Bank Ltd.*, [1967] E.A. 512 is on the question as to what was the actual guarantee given. In this respect the 1959 guarantee was given to cover “all advances from time to time by way of overdraft in current account” and the other three guarantees were given in much wider terms to cover “Every sum of money which may be now or may hereafter from time to time become due or owing to you anywhere from or by Luvule Coffee Hullers Ltd.” The second finding of the judge was on the much canvassed question as to whether or not the guarantees continued after the appellant company had ceased to be the managing agents. On this issue the judge found:

“All this shows, in my view, that by conduct the guarantees ceased to have effect from the date of the termination of the defendant’s managing agency, and the defendants were fully aware that a fresh account would be opened and that it was clearly in the minds of both the bank and the defendants that the latter would only be liable for the amount imputable to their agency. If that were not so, why should the Patels or their representative supervise the hulling-out and having the proceeds credited to their account? If by implication, as I find the guarantees ceased to be in force at the termination of the managing agency, then the terms of the guarantees came in force and the bank had specific powers to open a new account.”

The judge is making two findings here. First, he holds that by implication and he bases this on the parties’ conduct, the guarantees ceased to have effect from the termination of the managing agency, so that the terms of the guarantee came into force and the Bank had specific powers to open a new account; and secondly, he found that the appellants were fully aware of the arrangement to open a new account and that it was understood that the appellants would only be liable for the outstanding amounts up to the time of the appellant company’s agency.

At the appeal, Mr. Gratiaen’s main submission was that the trial judge was wrong in not holding that the appellants had been discharged from their guarantees by reason of the respondent opening the fresh account with the debtor company known as the “African Agency Account”. In the alternative, counsel for the appellants submitted that in any event some adjustment had to be made to the amount for which judgment was entered on 11 March 1969, and that in this respect it may be necessary for this Court to give directions as to how this amount was to be arrived at.

Counsel for the respondent in reply had alternative submissions. First, he supported the finding of the trial judge that the guarantees ceased to continue in force after the termination of the third appellant company’s managing agency and that, therefore, the respondent bank had specific powers under the terms of the guarantees to open the fresh account, in the alternative he submitted that if the guarantees continued in force then that these guarantees covered all the various accounts between the debtor company and the respondent bank and

would also, therefore, cover advances made under the new account the “African Agency Account”. He submitted that the opening of various accounts between the debtor and the bank was only done for administrative convenience. The guarantees he submitted would cover all accounts and the liability of the guarantors was for the net amount due by debtor to the bank at any one time, after taking into account all the balances debited or credited to all the various accounts.

I would first consider whether the trial judge was justified in his finding that by conduct or by implication the guarantees ceased to be continuing guarantees as from the date of the termination of the appellant company’s managing agency. It is clear that there were no admissions on this point. The appellants abandoned this as a part of their case and no direct evidence was called by either party to establish this as a fact. It is a fact that the respondent bank do not claim any amount due by the debtor company after the date of termination of the appellant company’s managing agency but nowhere in its pleadings or in the evidence called has it been averred or proved that the guarantee had, in fact, been discontinued after that date. It is I think agreed that legally the fact that the third appellant company was the debtor’s managing agent at the time that the appellants gave the various guarantees is unrelated, both were separate and distinct contracts even though it appears clear that the appellants only gave the guarantees because of the third appellant being the managing agent.

In the respondent bank’s pleadings and in counsel for the respondent’s opening address and again in the evidence of the respondent bank’s principal witness, a Mr. John Duffus, it was clearly stated that what the bank was doing was to waive its right as guarantors and only claim the amount due by the debtor company up to the time that the appellant company’s managing agency had been terminated. This was only a voluntary waiver of its legal rights, done gratuitously and without consideration, whilst what the appellants claim under paragraph 4 (*h*) of their amended defence was a binding contract. I have considered the reasons given by the trial judge for his decision, but in my view these reasons did not establish anything further but that the bank was voluntarily waiving a portion of its rights under the guarantee. Both the witnesses Mr. Duffus and Mr. S. M. Patel, the first appellant, stated in their evidence that there was a discussion as to the repayment and as to the redemption of the securities given under the debentures, or otherwise given by the appellants, but no agreement on this point was ever reached. I am of the view that the judge was not justified in finding that the guarantees had ceased by implication to have effect as from the date of the termination of the defence managing agency. In my view, the guarantees continued to be in force after that date and accordingly the respondent bank cannot rely on the provisions of paragraph 5 of the last three agreements as justification for the opening of the new account with the debtor company.

In considering whether the appellants were discharged from their liabilities as guarantors by virtue of the opening of this account, it will be necessary to consider the purpose of and effect of paragraph 5 and whether the bank, in so far as the appellants’ liability is concerned, could only open a fresh account by virtue of this paragraph. I would here first refer to the first two paragraphs of the last three guarantees, which state:

- “1. In consideration of your agreeing at the request of the Undersigned not to require immediate payment of such of the sums mentioned below as are now due or unpaid and in consideration of any further sums which you may hereafter advance or permit to become due the Undersigned Manibhai Chhotabhai Patel Limited hereby guarantee to you the payment to you on demand of every sum of money which may be now or may hereafter from

time to time become due or owing to you anywhere from or by Luvule Coffee Hullers Limited, (hereinafter referred to as 'the Debtor' which expression shall where the Debtor is a firm include the person or persons from time to time carrying on business in the name of the said firm) or from or by the Debtor jointly with any other or others in partnership or otherwise including the usual banking charges.

2. This guarantee is to be a continuing security for the whole amount now due or owing to you or which may hereafter from time to time until the expiration of the notice hereinafter mentioned become due or owing to you by the Debtor and remain unpaid but nevertheless the total amount recoverable hereon shall not exceed Shillings two million five hundred thousand together with interest thereon at your then current rate from the date of your demand until payment."

This is a very wide guarantee and it covers all advances or amounts of money due by the debtor company at any time or place and was not limited as in the 1959 guarantee to "overdrafts on current accounts". Paragraph 2 states that it is "a continuing security for the whole amount now due or owing to you or which may hereafter from time to time become due or owing". On the face of these paragraphs, these guarantees are not limited to one account nor to overdrafts on current accounts. It extends and covers all amounts due to the bank by the debtor company incurred at any time or place and this guarantee would, therefore, on the interpretation of these paragraphs cover all the balances due on all accounts between the respondent bank and the debtor company and, in my view, the reference to "the whole amount now due and owing" would mean the net balance due after taking the balance of all accounts into consideration.

The question here is, does paragraph 5 which specifically deals with the opening of a fresh account exclude the opening of a fresh account save in the circumstances therein set out? Does the maxim "expressio unius est exclusio alterius" apply? Paragraph 5 states:

"You are to be at liberty in the event of this Guarantee ceasing from any cause whatsoever to be binding as a continuing security on the Undersigned or any of them (if more than one) to open a fresh account or accounts with the Debtor and no moneys paid from time to time into any such account or accounts by or on behalf or to the credit of the Debtor shall on a settlement of any claim under this Guarantee be appropriated towards or have the effect of payment of any part of the moneys due from or owing by the Debtor at the time of this Guarantee ceasing to be so binding as aforesaid unless the person paying in such moneys shall at the time direct you in writing specially to appropriate the same to that purpose."

In my view, the real purpose of paragraph 5 was to exclude the rule in *Clayton's case* (*Devaynes v. Noble* (1816), 1 Mer. 529), 35 E.R. 767, so as to prevent any amounts lodged to the credit of the new account from being first put towards the reduction of the older debt, that is, towards the previous overdraft guaranteed by the appellants. In my view, paragraph 5 does not in any way limit the guarantee to any one account but it is a guarantee covering the total indebtedness of the debtor company to the respondent bank. I am, therefore, of the opinion that the respondent bank could open and operate this fresh account with the debtor company without obtaining the consent of the appellants and that the appellants' guarantee covered any amount advanced or owing by the bank under the new account. The judge was of the opinion that paragraph 8 of the guarantees was the clause which gave the respondent bank the power to vary his dealings with the debtor company without the guarantor's consent, I have already set out paragraph 8. In my view, this paragraph is of relevance in

showing the wide scope that the respondent bank had in its dealings with the debtor company without affecting the liabilities of the guarantors, but the whole guarantee must be read and construed as one. Counsel for the appellants has submitted, and I agree that the principle, “verba fortius accipiuntur contra proferentem” must always be borne in mind, but I am of the view here that the guarantees are clearly worded and there is no ambiguity. The guarantees were worded in the widest possible terms so as to cover all amounts due and owing by the debtor company to the bank and I am of the view that the bank did have the right to open this fresh account, the “African Agency Account” without first having to obtain consent of the guarantors. It is, I think, agreed that the opening of the fresh account did not create any new relationship or in any way change the contract or the nature of transactions between the debtor and the bank. The debtor company continued in business and the respondent bank continued to finance its operation by advances by way of overdrafts on its account.

The only difference appears to have been the fact that the new managing agents, the African Coffee Auctioneers and Brokers Ltd., also gave a guarantee as from the date of its appointment as managing agents. With the guarantee continuing I cannot see that the appellants suffered any disadvantage, real or potential, by the opening of the new account. The new account was never in credit. The position would have been different if the new account was in credit and respondent bank continued to charge the debtor company, and also the appellants, interest on the outstanding amounts on the previous accounts without first deducting the amount to the credit of the new account. This position never arose and it cannot be assumed that the bank would have acted wrongly and charged the appellants interest on one account and not on the overall balance of all accounts. It is a fact that the bank used the profit made by the receiver to first reduce the overdraft on the “African Agency Account” and not that of the account up to the termination of the appellant company’s agency. In this respect, it may appear that there is a disadvantage to the appellants but this is not really so if the guarantees continued as their liability would be then as guarantors on all the accounts for the net balance due. However, if in fact the guarantee did not continue then paragraph 5 of the three later guarantees would apply and give the respondent bank express power to open this new account. It seems to me, therefore, that whether or not these guarantees continued, the respondent bank would in any event have maintained its rights as against, at any rate, the first and third appellants under the last three guarantees.

I have dealt with the last three guarantees on the basis of the actual terms of the contract. There can be no doubt that a surety will be discharged if there is a variance in the terms of the guarantee contract as between the guarantor and the principal debtor, if such a variation is done without the surety’s approval and consent. This question has been fully dealt with by this Court in its decision in the case of *Harilal v. Standard Bank*, [1967] E.A. 512 which followed the decision of the Privy Council in the *National Bank of Nigeria Ltd. v. Awolesi*, [1964] 1 W.L.R. 1311. The trial judge distinguished the facts in both of those cases and in this case. I agree that the facts are different. The last three guarantees in this case give a very full guarantee and in my view a much wider guarantee than in the *Harilal* and *National Bank* cases and as I have already pointed out, the opening of the new account does not appear to have effected any material alteration in the contract between the bank and the debtors, nor for that matter as between the bank and guarantors if the guarantees continued.

The second appellant’s position has to be considered on the basis of the 1959 contract and on the Indian Contract Act of 1872. The relevant section is s. 133 which states:

“Any variance, made without the surety’s consent in the terms of the

contract between the principal (debtor)(s) and the creditor, discharges the surety as to transactions subsequent to the variance.”

I have already stated that this guarantee was not as all embracing as that given in the last three guarantees although it does appear to be wide enough to cover the opening of the new current account with the debtor. Paragraph I of this guarantee states inter alia:

“In the consideration of your granting or continuing to grant advances from time to time by way of overdraft on current account to LUVULE COFFEE HULLERS LIMITED (hereinafter called ‘the Principal’) at your Masaka Branch we (jointly and severally if more than one) guarantee to pay to you on demand all amounts now or at any time so advanced and remaining unpaid together with bank charges and interest at such rate or rates as may from time to time be agreed by you with the Principal but with the limitation that our total liability hereunder shall not exceed Shillings one million five hundred thousand with interest thereon at your then current rate from the date of your demand till payment.”

As I have stated, however, the opening of this new account with the debtor was in fact a continuance of the arrangement between the respondent bank and the debtor company and there was, in fact, no variance of the contract within the meaning of s. 133 of the Indian Contract Act. It follows, in my view, that the second appellant’s guarantee under the 1959 guarantee was not discharged and accordingly the second appellant is also liable to the respondent bank in respect of this claim.

If, however, I am wrong in my interpretation of the facts and of the guarantee, the question arises as to whether the second appellant would in any event be liable under s. 133. I have heard the advantage of reading the draft judgment of my Lord President on this question. The ordinary meaning of s. 133 must be that the guarantor remains liable under the guarantees for liabilities incurred up to the date of the variation of the contract and he is then discharged as to liability on any transactions subsequent to the variation. The fact that ss. 134, 135 and 139 provide for the complete discharge of the surety on the happening of the events therein set out and that s. 133 specifically states that the discharge will only be a discharge as to transactions subsequent to the variation would appear to me to emphasise that it was the intention of the legislature by s. 133 to protect the rights of the creditor as against the guarantor for transactions that occurred prior to the variation of the debtor’s contract. The construction of s. 133 would have been simple if this section had stated in positive terms that the liability of the guarantors continued up to the date of the variation but, with respect, it appears to me that this must be the correct interpretation and that in fact s. 133 has varied the common law and preserved any liability incurred by the guarantor prior to the variation and this is exactly what the respondent bank seeks to recover in this action.

I would therefore have dismissed the appeal on the question of the appellants’ liability under the guarantees, but as the other members of the Court have decided to allow the appeal, I will not deal with counsel for the appellants’ alternative submissions.

Sir Charles Newbold P: The facts relating to this appeal are set out in the judgment of Duffus, V.-P., and I find it unnecessary to repeat them. I agree with him that the relevant guarantees to be considered in order to determine the issues raised on this appeal are, as respects the first appellant, the guarantee of 14 January 1963; as respects the second appellant, that of 7 August 1959; and as respects the third appellant, that of 14 January 1963. I also endorse

as strongly as I can his comments on the pleadings. The failure of each party to plead the facts fully and clearly, the lack of clarity and precision in the pleadings and the failure of the trial judge to frame issues have each contributed in no small way to a confused position and to the judge deciding issues in favour of the bank when the bank had either not pleaded the facts relevant to the issue or had denied the facts found in its favour. The only issue which arose clearly from the pleadings was whether the appellants were discharged from liability under their guarantees by reason of the action of the bank in opening, without their consent, a new account in favour of the debtor. Even in this issue no clear distinction is drawn between the position of the several defendants under the various guarantees signed by them. I am by no means clear, either from the pleadings or from the evidence or from the submissions, as to the position adopted by the bank on the question as to whether the guarantees continued in force after 10 April 1965, which is the date mentioned in the plaint as the date on which the debtor owed the sum sued for and for which it was claimed the defendants were liable under their guarantees.

Reduced to their simplest form the facts are that the defendants, by different guarantees with different maxima signed on different dates by some, and on no occasion by all, of them, guaranteed the repayment of sums advanced by the bank to a debtor carrying on a coffee hulling business. The sums were advanced in the normal manner by way of an overdraft account. In all but one of the guarantees, the last of which was given on 14 January 1963, there was a clause entitling the bank to open a fresh account with the debtor into which receipts could be credited on the guarantee ceasing to be a continuing guarantee, a position which would arise on the guarantors giving one month's notice to that effect. At the time the guarantees were given the bank held a debenture over the assets of the debtor with power to appoint a receiver and manager thereunder. On or about 29 June 1964 the bank closed the account of the debtor which was maintained under the guarantees and opened a new account, which was guaranteed separately by a new guarantor, into which all future amounts were debited or credited. Six months later the bank appointed a receiver under the debenture and on the instructions of the bank sums received from the receiver were credited only to the new account. The result was that over a period the new account was reduced from a considerable debit to a figure which may well have been in credit at the time the appeal was heard. It is possible also that some assets of the debtor were sold under the debenture and the proceeds credited to the new account.

I have no doubt that such action on the part of the bank had the effect, subject to consideration of the position under the Indian Contract Act of the second appellant on his guarantee of 7 August 1959 of discharging the appellants from their guarantees unless the appellants have consented in their guarantees or by separate agreement to the bank taking such action (see *Harilal v. Standard Bank Ltd.*, [1967] E.A. 512). A creditor may not, without the consent of the guarantor, so alter the course of his dealings with the debtor as in effect to create a debt which arises from a different course of dealings from that which gave rise to the debt guaranteed. The bank, by its action in ceasing to operate the old account and opening a new account with separate overdraft facilities separately guaranteed, sought to compartmentalise its dealings with the debtor, with the result that it obscured the total indebtedness of the debtor. This obscurity very possibly affected its utilisation of the security of the debenture, a security which in the final analysis was as much a security for the guarantors as it was for the bank.

Have the appellants, or any of them, consented to the bank opening a new account and taking the action that it did? The judge held that they did. In the guarantee of 7 August 1959, under which the second appellant is liable, no

provision exists enabling the bank to open a new account and take the action that it did. In the guarantees of 14 January 1963, under which the first and third appellants are liable, provision exists enabling the bank to take the action it did when the guarantee ceased to be a continuing guarantee; but under the terms of the guarantees such a position only arose if the guarantors gave one month's notice to that effect and no such notice was given. It is true that the terms of the actual guarantee in the first clause are wide; but these wide terms must be related to the nature of the debt and the course of dealing at the time the guarantee was given and they would not, especially in the light of the other provisions of the guarantee, permit of the bank changing the course of dealings, ceasing to operate the old overdraft account except for the purposes of debiting interest and opening a new overdraft account. Thus the appellants have not consented in the guarantees themselves to the bank taking such action. It is not clear to me if the trial judge held that the appellants had consented to the bank taking such action in the guarantees themselves, as he referred to the clause in each of the guarantees which enabled the bank to vary the amount of any credit and to grant indulgences to the debtor as if these clauses gave very wide powers. Having regard, however, to the passage quoted by the Vice-President from the judgment of the trial judge, the trial judge appears to base his finding on a separate implied agreement rather than on any provision contained in the guarantees. If the judge did consider that the provisions entitling the bank to vary the amount of the credit or grant indulgences entitled the bank to take the action it did, then I regret I am unable to agree with him as in my view they clearly do not. The law has always been jealous to protect a guarantor who, especially in a continuing and fluctuating liability, is very much at the mercy of the creditor. I reject entirely the submission referred to by the judge that these guarantees gave to the bank *carte blanche* to do what it wished and I did not understand counsel for the respondent to make that submission before us.

Was there any separate agreement under which the consent was given? The judge appears to hold that there was and that it arose from an implied agreement under which, *inter alia*, the guarantees ceased to be a continuing guarantee and the bank was entitled to open a new account. No such implied agreement was pleaded and, indeed, it is contrary to the attitude taken by the bank on at least some stages of the trial. I think it quite wrong for a judge to find an implied provision in an implied agreement in favour of a particular party when that party has never pleaded such an agreement and, indeed, at times has denied it. May I again refer to the following words of Lord Cranworth, which I referred to with approval in *Nurdin v. Lombank*, [1963] E.A. 304 at p. 315, when I was dealing with a submission of the existence of an implied agreement:

“When parties, who have bound themselves by a written agreement, depart from what has been so agreed on in writing, and adopt some other line of conduct, it is incumbent on the party insisting on, and endeavouring to enforce, a substituted verbal agreement, to show, not merely what he understood to be the new terms on which the parties were proceeding, but also that the other party had the same understanding – that both parties were proceeding on a new agreement, the terms of which they both understood.”

I agree with the Vice-President that the judge was not justified in coming to the conclusion that there was an implied agreement under which the guarantees ceased to be continuing guarantees and which entitled the bank to take the action that it did. Thus I am satisfied that as far as the guarantees of the first and third appellants are concerned, which guarantees are to be construed according to the common law and doctrines of equity of England, modified to

meet the needs of the people of Uganda, the action taken by the bank has resulted in their being discharged from their liability under their guarantees.

The liability of the second appellant is, however, to be determined under the Indian Contract Act, and by s. 133 of that Act it is provided that variance made without the guarantor's consent discharges the guarantor as to transactions subsequent to the variance. The implications behind the section is that the guarantor remains liable on his guarantee up to the time of such variance. In the *Harilal* case (supra) I reserved my views on the effect of this section. It would seem that although the section ceased to have effect in Uganda from 1963 I shall have to come to a conclusion as to its meaning. I find the greatest difficulty in understanding what it means. If the implication I have set out above is correct, then the section is in conflict with later sections, such as ss. 134, 135 and 139, which set out that a guarantor is wholly discharged by such variance. In *Moholalbai v. Setalwad* (1934), 62 I.A. 23, the Privy Council said at p. 35 when dealing with the effect of this section:

"It could hardly be contended that . . . if a surety guaranteed repayment of an advance to be made to the principal debtor on a specific contract that the advance was to be applied towards the purchase of real estate, the creditor could, whether he and the debtor rescinded the specific contract or not, recover from the surety on the advance of a sum made to finance speculations in shares."

These words result in a construction of the section in such a way as not to give effect to the implication that the contract of guarantee is valid up to the time of the variance and the guarantor liable for the debt existing at that time. Such a construction would agree with the later sections of the Act and with the common law, though it is not clear what effect, if any, s. 133 would then have, unless the section relates only to such minor variances which would not discharge the guarantor. With some hesitation I have come to the conclusion that the section could not have been intended to effect a radical change in the common law and that whatever else it means it should not be construed in such a way as, contrary to the common law and the later sections of the Act, to retain the existence of a liability under a contract which would otherwise be discharged. In my view, therefore, the action taken by the bank has also resulted in the discharge of the second appellant from his liability under his guarantee.

For these reasons I would allow the appeal, set aside the judgment and decree of the High Court and substitute therefor a judgment and decree dismissing the suit with costs. I would also allow the appellants the costs of the appeal with a certificate for two advocates.

As Fuad, J., agrees it is so ordered.

Fuad J: I have had the advantage of reading in draft the judgments prepared by Duffus, V.-P., and by Sir Charles Newbold, P. I respectfully agree with the views of my Lord the President on every aspect of this appeal and I therefore do not think that I can usefully add anything. I agree with the order proposed by him.

Appeal allowed.

For the appellants:

E. F. N. Gratiaen Q.C. and *S. H. Dalal* (instructed by *Dalal and Singh*, Kampala)

For the respondent:

O. J. Keeble and *J. Kateera* (instructed by *Hunter and Grieg*, Kampala)

Bikwatirizo v East African Railways Corporation
[1970] 1 EA 134 (HCU)

[Division:] High Court of Uganda at Kampala
Date of judgment: 21 November 1969
Case Number: 197/1969 (165/69)
Before: Russell Ag J
Sourced by: LawAfrica

[1] *Negligence – Railway – Track subsidence – Whether railway negligent.*

[2] *Negligence – Res ipsa loquitur – Railway accident – Track subsidence – Whether onus on railway to disprove negligence.*

Editor's Summary

The plaintiff was injured when a train in which she was travelling was derailed as a result of subsidence of the track. She alleged that the track was not maintained in proper condition and relied on the doctrine of res ipsa loquitur to establish negligence.

Held –

- (i) as trains do not usually run off the rails which are under the exclusive control of the defendant the onus of disproving negligence was on the defendant (*Embu Public Road Services Ltd. v. Riimi* (1) followed).
- (ii) on the evidence, the line was adequately constructed, the orders for routine inspections were adequate to ensure the proper maintenance of the line and there was no evidence that the inspections had not been carried out.

Claim dismissed.

Cases referred to in judgment:

(1) *Embu Public Road Services Ltd. v. Riimi*, [1968] E.A. 22.

Judgment

Russell Ag J: The plaintiff, Mrs. Bikwatirizo Mareby, was a fare-paying passenger in a train which she had joined at Kamwengo en route for Kampala on the evening of 19 October 1968. While the train was passing through the Kamwengo-Bihanga section of the line near Kibuga Halt it, or part of it, was derailed and by reason of that derailment the plaintiff suffered personal injuries. She now claims damages from the defendant as she contends the derailment was caused by the negligence of the defendant or those for whom it may be held responsible and further contends the doctrine of res ipsa loquitur applies thus

provisionally casting the burden of proof on the defendant.

Section 31 (1) as the East African Railways Corporation Act 1967 (which is similar to s. 27 (1) of the repealed East African Railways & Harbours Act) reads:

“(1) The Corporation shall not be liable for the loss of life of, or personal injury to, any passenger except where the loss of life or personal injury is caused by the want of ordinary care, diligence or skill on the part of the Corporation or of any employee:

Provided that nothing herein shall impose upon the Corporation any liability from which it is exempt under the provisions of this Act.”

Mr. Khaminwa for the defendant contended the doctrine of *res ipsa loquitur* did not apply under the circumstances disclosed in the pleadings and referred me to the appellate judgment in *Embu Public Road Services Ltd. v. Riimi*, [1968]

E.A. 22, which was a case where a bus had suddenly swerved and overturned while travelling along a straight road at a reasonable speed. After a careful perusal of the judgments it appears to me that the doctrine of *res ipsa loquitur* was in fact applied and acted on in that case as in the court of first instance the defendant accepted the onus of proof and led evidence to rebut the inference of negligence. The facts revealed in the pleadings in this suit are more strongly in favour of the doctrine being applied than the Riimi case (*supra*) as trains do not normally run off the rails and the rolling stock, the rails and the land on which the rails were laid are under the exclusive control and maintenance of the defendant. It was for these reasons that I held the doctrine of *res ipsa loquitur* applied and the defendant therefore opened and led evidence to rebut the inference that the derailment had been caused by the want of ordinary care, diligence or skill on the part of the defendant or of those for whom it is responsible.

The plaintiff, in the plaint, contended that even if the doctrine of *res ipsa loquitur* was not accepted by the court as being applicable the defendant had been guilty of negligence in that:

- “(a) the train was driven at an excessive speed
- (b) the railway line was not maintained in proper condition
- (c) the engine driver failed to slow down in reaching what was to be the scene of the accident when he should have done so.”

In its defence the defendant after contending the doctrine of *res ipsa loquitur* did not apply alleged that the said derailment was caused by the sinking of the track “as a result of extraordinary heavy rainfall during the period” and:

- “3. (b) the said rainfall was unprecedented in its character and extent and was such as could not be reasonably anticipated and amounted to an Act of God, and the defendant accordingly denies liability;
- (c) in the alternative the defendant denies that the derailment was due to the alleged or any negligence of the defendant’s servants or agents.”

It emerges from the evidence on record, and was not seriously challenged by counsel for the plaintiff, that the train was not being driven at an excessive speed nor was there any substance in the plaintiff’s allegation that the engine driver failed to slow down or, under the circumstances, should have slowed down when nearing the scene of the derailment. This leaves the substantive contention that the “railway line was not maintained in proper condition”.

The allegation in the defence as to unprecedented rains and an Act of God were certainly not substantiated by the meteorologist, Mr. Godfrey Kaggwa or any other witness. Mr. Kaggwa merely stated the rainfall during the relevant period, taken over the area generally, was slightly above average. This leaves the defendants with the contention that neither the defendant nor those for whom it was responsible were guilty of negligence in that they failed to maintain the relevant part of the railway line in a safe condition.

As I have already stated the onus was on the defendant to satisfy the court that there had been ordinary care, diligence or skill used in maintaining the said railway line as there is unchallenged evidence on record that the derailment was caused by a subsidence in the line at the point of the derailment and for no other cause.

The defendant called Mr. Mills, who is a fully qualified engineer, and Mr. Sheffield, who has been a Permanent Way Inspector on the engineering side since 1935. I was impressed with both these witnesses, who were not in the

slightest shaken in cross-examination and appeared to me to be completely honest and straightforward.

Mr. Mills testified that the said particular section of the line had been ballasted with stone down to a depth of 8". In his professional opinion that was an adequate and reasonable safeguard against subsidence. He admitted it could have been rendered even safer if the clay had been dug down and removed to a depth of 10" and replaced by stone or concrete but in his opinion this was not necessary and would have been an unjustified expense.

Mr. Sheffield testified to the same effect as Mr. Mills and, in his considered opinion, the construction and maintenance of the line at that particular section complied with normal railway standards. He detailed the routine provisions as to the maintenance of the line but it is not necessary for the purpose of this judgment to set out in detail the prescribed duties of the Permanent Way Inspectors, gangers and workmen. Suffice it to say the orders as to routine inspections and reports were adequate to ensure as far as reasonably practicable the proper maintenance of the said line.

I have no reason to find that on the relevant day the standing orders as to routine inspections had not been carried out. No reports had been received as to any indications that the line was not in good condition and there is no evidence on record as to any abnormal or unprecedented rainfall which would have necessitated or made advisable any extraordinary precautions. Mr. Haque for the plaintiff has asked me to find that the Keyman failed to make his routine duty inspection of the line as he had not been called as a witness for the defence. I am not impressed by this argument and not prepared to speculate on his suggested dereliction of duty.

For these reasons I am fully satisfied the defendant, or those for whom it is responsible, did in fact exercise ordinary care, diligence and skill in the construction and maintenance of the said section of the said line and the defendant has discharged the provisional onus of proof cast upon him by the doctrine of *res ipsa loquitur*.

Although both counsel have referred me to a considerable number of decided cases involving the doctrine of *res ipsa loquitur* and inevitable accident they do not appear to me to be of any value in deciding the simple issue in the instant suit – did the defendant, or those for whom it was responsible, exercise reasonable care, diligence and skill in the maintenance of the said line.

As much as I sympathise with the plaintiff in the suffering she has been caused as a result of the derailment I have no alternative but, for the above stated reasons, to dismiss her claim with costs.

If there are further proceedings in relation to this suit I will only add that if I had to assess the general damages claimed by the plaintiff I would have made an award of Shs. 20,000/-.

Claim dismissed.

For the plaintiff:

Z. Haque (instructed by *Haque & Gopal*, Kampala)

For the defendant:

J. M. Khaminwa & P. G. Ferro.

Mawji v Arusha General Store

[1970] 1 EA 137 (CAD)

Division: Court of Appeal at Dar-es-Salaam
Date of judgment: 21 October 1969
Case Number: 19/1969 (168/69)
Before: Sir Charles Newbold P, Duffus VP and Spry JA
Sourced by: LawAfrica
Appeal from: High Court of Tanzania – Platt, J.

[1] Civil Practice and Procedure – Decree – Giving effect to decree – Whether prevented by Civil Procedure Rules, O. 22, r. 3 (T.).

[2] Civil Practice and Procedure – Inherent jurisdiction – Exclusion of – Whether excluded by express remedy – Civil Procedure Code, ss. 89, 95 (T.).

[3] Civil Practice and Procedure – Nullity – Whether irregularity in relation to rules of procedure vitiates proceedings.

[4] Civil Practice and Procedure – Possession – Whether order for possession can be made under Civil Procedure Code, O. 39, rr. 31 and 33 (T.).

Editor's Summary

The appellant brought in the district court a suit for possession of premises against the respondent and obtained a decree for possession. She obtained possession of the premises before the respondent's appeal to the High Court was heard. The High Court declared the proceedings null and void and set aside the order for possession. The respondent asked for possession both orally in court and by an application expressed to be under O. 39, rr. 31 and 33. The High Court granted the order and the appellant appealed contending that the application under O. 39 was misconceived, that redress should have been obtained by separate suit under s. 89 of the Civil Procedure Code, and could not be obtained in exercise of the inherent jurisdiction of the court.

Held –

- (i) application under O. 39 was not the proper procedure to have been adopted;
- (ii) irregularity in relation to the rules of procedure do not vitiate the proceedings if no injustice has been done to the parties;
- (iii) the fact that a procedure to obtain redress is laid down by Civil Procedure Code, s. 89 does not preclude the High Court from giving effect to its decision;
- (iv) O. 22, r. 3 of the Civil Procedure Rules does not prevent the court from giving effect to its decision.

Appeal dismissed.

Cases referred to in judgment:

- (1) *Ali v. Amritlal* (1950), 17 E.A.C.A. 88.
- (2) *Rawal v. Mombasa Hardware Ltd.*, [1968] E.A. 392.
- (3) *Matemba v. Matemba*, [1968] E.A. 646.

The following extempore judgments were delivered.

Judgment

Sir Charles Newbold P: This is an appeal by Mrs. Mawji, who was the landlady of certain premises, against an order for restitution of possession of those premises given by the High Court in favour of the Arusha General Store, which was the tenant of those premises. The facts, very briefly and so far as they are relevant, are that the landlady brought a suit for possession of

the premises in the district court and possession was granted to her. The tenant then appealed and it was held that the district court had no jurisdiction to grant the order for possession. Accordingly the High Court, which was the first appellate court, made an order that the appeal be allowed “and the proceedings in the court below declared null and void and the order for vacant possession is therefore set aside”. Between the date of the order in the district court granting possession and the date of the order on appeal declaring those proceedings a nullity, possession was, in fact, granted to the landlady. Immediately after the High Court gave its judgment, which ended with the words I have just referred to, an application was made by the advocate for the tenant asking for restitution, that is, that possession of the premises be restored to the tenant who had vacated them in compliance with the order for possession granted to the landlady by the district court, which order had been declared a nullity. No specific direction of the High Court was made consequent upon this application, but during the course of the argument the advocate for the tenant stated that he would make a separate application for directions consequent upon the judgment of the High Court declaring the order of the district court a nullity. This application was, in fact, made. It purports to have been made under O. 39, rr. 31 and 33. This application then came before the court and in the order on this application the High Court directed that there should be restitution of the premises to the tenant. It also, incidentally, directed that the plaint should be returned to the respondent, that is to the landlady, for presentation to the proper court.

From that order for restitution the landlady has appealed to this Court on three grounds. The first is that the application was misconceived as there was no power under O. 39, rr. 31 and 33 for the High Court to make this order for restitution. That does not seem to be contested by the tenant on this appeal and for myself I have grave doubts whether an application under O. 39 is the appropriate procedure which should have been adopted in this case. It is, however, in my view completely immaterial whether the procedure was precisely what it should have been. We have repeatedly said that the rules of procedure are designed to give effect to the rights of the parties and that once the parties are brought before the courts in such a way that no possible injustice is caused to either, then a mere irregularity in relation to the rules of procedure would not result in vitiation of the proceedings. I should like to make it quite clear that this does not mean that the rules of procedure should not be complied with – indeed, they should be. But non-compliance with the rules of procedure of the court, which are directory and not mandatory rules, would not normally result in the proceedings being vitiated if, in fact, no injustice has been done to the parties.

Now in this case, while the procedure may not strictly have been appropriate, the judge of the High Court specifically stated in his order on the application the following words:

“I have treated the application as being part of the argument addressed to the Court on the day that judgment was delivered and that any subsequent order would form the final orders to be given consequent upon the decision that the trial was a nullity.”

With those words he has treated the order which he made on the application as being nothing other than a continuance of the judgment which he gave on 8 February and immediately after which this application for restitution was made. All the parties were before the court and in my view any irregularity in making this application which purports to be under O. 39, rr. 31 and 33, is an irregularity which has in no way affected the jurisdiction or the power of the High Court to make the order. I am satisfied that the court had the power to make this order

for restitution notwithstanding the fact that it seems to have been made consequent upon the application, although the judge himself treated it as being a continuation of his judgment.

The next ground on which the landlady appeals to this Court is that under s. 89 of the Civil Procedure Code there is specific power given to the tenant to obtain redress by way of a suit and that, this being so, the court should not invoke its inherent power to give effect to its order declaring the proceedings a nullity as the Code has laid down the machinery for enabling the tenant to obtain repossession. May I at once say this: As I have said in other cases, a court must have power to give effect to its orders. Reference has been made to the decisions of this Court in relation to the recalling of an order. I consider that these decisions have nothing to do with the matter. This is not a case of recalling an order; this is a case of giving effect in one part of the order to the decision arrived at in another part. I am quite satisfied that it would be nonsense so to stultify the activities of any court of justice that it would be unable to give effect to a decision which it had just handed down. As I said in *Rawal v. Mombasa Hardware Ltd.*, [1968] E.A. 392, to which Mr. Lakha has referred, no provision of the rules should be so construed as to preclude a court from giving effect to its decision. In that case I referred to the equivalent Kenya section. I now refer to s. 95 in the Tanganyika Civil Procedure Code 1966, which reads:

“Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

I am satisfied that that section means that a court should not be precluded by anything incidentally set out in the Code or in the rules made under the Code from giving effect to its decision, and giving effect in a way which will result immediately in justice between the parties and in the saving of unnecessary proceedings. Even if s. 89 (2) does give the power to give effect to this judgment by a separate suit, that would not preclude the High Court from giving effect to its judgment in a more efficacious way. Even if s. 89 (1) restricts the power given by it to the court of first instance, which in the circumstances of this case has no jurisdiction, to order restitution, and there is no provision elsewhere vesting this power in the High Court, that would not prevent the High Court from giving effect to its decision. A court must have the power, unless it is most clearly set out to the contrary by legislation, to give effect to its decision and that is all that the court sought to do here. It is not suggested that the discretion, which of course must lie in the court as to the manner in which to give effect to its decision, was wrongly exercised in this case. The argument is that the court did not have the power to make this Order. I am satisfied that it did and, indeed, that any court must have the power to give effect to its decisions.

Order 20, r. 3, has been referred to in a judgment of a judge of this Court, *Ali v. Amritlal* (1950), 17 E.A.C.A. 88, which incidentally was a minority judgment, to the effect that this rule precluded a court from giving effect to its judgment. That judgment in my view should not be followed. I am not at all sure that O. 20, r. 3, should be construed in the way in which, I think it was Sir Barclay Nihill, construed it, because if one looks at it there is nothing which prevents a court from giving effect as part of its judgment to its decision. In any event there is abundant authority for a court in certain circumstances to recall its order and I am satisfied that the inherent power of that court conferred upon it by the Civil Procedure Code would override the provisions of this rule. I might also mention that in the Tanzania case of *Matemba v. Matemba*, [1968] E.A. 646 the Chief Justice gave effect to his decision notwithstanding the fact that that rule was drawn to his attention.

The final ground was that the appellate judge of the High Court, having first of all held that the High Court could do nothing other than set aside the order of the district court as a nullity, then proceeded to do something more. As counsel for the respondent pointed out, the words referred to must be construed in the light of the passage immediately following those words. It is clear that the High Court did not mean that it was not open to it to make an order giving effect to its judgment; indeed, it proceeded to do so on the application before it.

I am satisfied that the High Court had full jurisdiction to make this order for restitution, just as it had full jurisdiction to make the order that the plaint be returned for presentation to the proper court, and I would accordingly dismiss the appeal.

Duffus VP: The trial judge dealt with this matter as a consequential order which followed, as a result of arguments, after he had delivered his judgment finding that the proceedings before the district court were a nullity and ordering that the order for vacant possession be set aside.

Section 89 (1) of the Civil Procedure Code applies in this case and ordinarily the court of first instance – in this case the district court – which made the order for possession would, acting under the provisions of that section, have made an order causing such restitution to be made as would, as far as may have been possible, place the parties in the position which they would have occupied but for the order of possession which had been set aside. In this case the judge on appeal held that the district court had no jurisdiction under the Rent Restriction Act and therefore no power to have taken the proceedings, which he held to be a complete nullity, and therefore the district court had no jurisdiction to act under the provisions of s. 89 (1).

This question has not been fully argued before us, but a judge of the High Court, sitting on appeal, has extremely wide powers under the provisions of s. 76 of the Civil Procedure Code and I agree with my lord President that this must include the power to make the order of restitution which he eventually made in this case. If he had not made this order then the effect of his decision setting aside the order for possession would have had little practical effect, and the result would have been, as the learned judge sets out – that the landlady would be allowed to take advantage of an illegal order, an order made by a Tribunal acting without any legal authority. In my view the High Court must, in any event, have had the power to act in its inherent jurisdiction and to make such an order as was in the words of s. 95 of the Civil Procedure Code necessary for the ends of justice or to prevent the abuse of the process of the court. I would therefore agree with my lord President that this appeal be dismissed.

Spry JA: I also agree and I would only add a few remarks. I think it is unfortunate that when the question of jurisdiction was first raised application was not made to amend the memorandum of appeal to the High Court. However, I have no doubt that restitution had to be ordered if the judgment of the High Court on the appeal were not to be ineffectual. I have no doubt that the High Court had jurisdiction to order restitution and the only question is whether that jurisdiction should have been exercised. I prefer not to express any opinion on the question of whether sub-s. (1) of s. 89 should have been invoked and I would only say that in my view, in the circumstances of this case, no general principle was offended by the exercise of the court's inherent jurisdiction and I think that it was undoubtedly the best course to minimise expense in a matter which still has to begin again. I agree with the judgments which have been delivered.

Appeal dismissed.

For the appellant:

V. Dev Vohora

For the respondent:

A. Lakha (instructed by *Raj Vohora & Co.*, Arusha)

**Steel Construction & Petroleum Engineering (E A) Ltd v Uganda Sugar
Factory Ltd**
[1970] 1 EA 141 (CAN)

Division: Court of Appeal at Nairobi
Date of judgment: 20 December 1969
Case Number: 28/1969 (169/69)
Before: Sir Charles Newbold P, Duffus VP and Spry JA
Sourced by: LawAfrica
Appeal from: The High Court of Kenya – Chanan Singh, J

[1] Costs – Taxation – Appeal – Whether judge should reassess fee or remit for retaxation.

[2] Costs – Taxation – Instruction fee – Amount of – Whether sum allowed indicates error of principle.

[3] Costs – Taxation – Instruction fee – Whether matter improperly taken into account.

[4] Costs – Taxation – Witness expenses – Expert witness – Whether daily fee allowable.

Editor's Summary

The appellant filed a bill of costs in the High Court on which the taxing officer allowed an instruction fee of Shs. 27,000/- and certain witness expenses. The respondent appealed to the High Court which disallowed the witness expenses and reduced the instruction fee by Shs. 15,000/- on the ground that the award was so high as to indicate an error in principle, and that the taxing officer improperly considered the counterclaim in assessing the fee.

Held –

- (i) (Duffus, V.-P., Spry, J.A.; Sir Charles Newbold, P., dissenting) the judge would not have been entitled to interfere on the ground solely that the instruction fee was too high;
- (ii) (by the court) the taxing officer had improperly taken into account the counterclaim in his assessment of the instruction fee;
- (iii) whereas a judge has a discretion to retax a bill himself, where a fee has to be reassessed on different principles it should generally be remitted to the same or a different taxing officer;
- (iv) the reassessment of the instruction fee should be remitted to the same taxing officer;

- (v) a daily charge in respect of the attendance in court of an expert witness can in proper circumstances be allowed in a party and party bill of costs;
- (vi) on the facts the witness expenses were properly struck off.

Appeal allowed in part.

Cases referred to in judgment:

- (1) *Taj Deen v. Dobrosklonsky*, [1957] E.A. 379.
- (2) *D'Souza v. Ferrao*, [1960] E.A. 602.
- (3) *Arthur v. Nyeri Electricity Undertaking*, [1961] E.A. 492.

The following considered judgments were read.

Judgment

Spry JA: This is an appeal from an Order of the High Court made on an application under paragraph 11 of the Advocates (Remuneration) Order for varying a decision of the taxing officer. The matter arose out of a suit in which the appellant company sued the respondent company for Shs. 75,197/76 due under a building contract, Shs. 128,817/52 damages for breach of the contract and Shs. 1,608/-, for what I am not clear. The respondent company counter-claimed for Shs. 267,766/37 under a penalty clause in the contract. After an abortive attempt at arbitration and over twelve days of hearing in the High Court, the matter was settled. By consent, judgment was given for Shs. 70,000/-, plus interest amounting to Shs. 13,578/-. In effect, the claim to damages and the counterclaim were both abandoned. An order was made for costs in favour of the appellant company in the following terms:

- “2. That the defendant do pay to the plaintiff its costs of this suit on the higher scale to be taxed and certified by the Taxing Master of this Court on the basis of an instruction fee assessed on Shs. 201,000/-, together with interest thereon at 6% per annum from the 3rd day of November 1967 until the date of payment thereof in full;
3. That the Defendant’s Counter-claim be, and is hereby dismissed with no order as to costs in respect thereof save and except that all work done in the suit whether in respect of the claim or Counter-claim shall be treated as work done in respect of the claim for the purposes of taxing the Plaintiff’s costs.”

The present appeal concerns, first, the instruction fee, and consequently the getting up fee, which was allowed at one-third of the instruction fee, and secondly, two items of payments to an expert witness. I shall deal with these separately.

The appellant company claimed an instruction fee of Shs. 49,092/-. The taxing officer taxed off Shs. 22,092/-, reducing it to Shs. 27,000/-. In the High Court, the learned judge further reduced it to Shs. 15,000/-.

Counsel for the appellant company based his main argument on the proposition that the amount of Shs. 27,000/- had been awarded by the taxing officer in the exercise of his discretion, and that the learned judge was wrong to interfere with the exercise of that discretion. The learned judge said in his Order that he accepted the taxing officer’s “general assessment of the nature of this case” and had referred to it as “a complicated case”. Therefore, in counsel’s submission, the learned judge had found no error of principle and the error of quantum, if there was an error, was not so great as in itself to justify interference.

Counsel for the appellant sought to supplement this argument by referring to what he claimed were misdirections in the Order. These really come down to two. First, there were certain remarks of the learned judge relating the total bill of costs as taxed (Shs. 68,892/15) to the amount of Shs. 70,000/- awarded: Counsel argued that in view of the consent decree, the proper figure to which the bill might be related was Shs. 201,000/-.

Secondly, the learned judge had said that in agreeing that the instruction fee should be based on Shs. 201,000/-, rather than Shs. 70,000/-, the parties were agreeing to increase it 2.5 times, which he thought “was their own measure of the importance of the case”, and he had applied the same standard to the excess over the basic fee: counsel submitted that the excess was something to be assessed by the taxing officer on the basis of the complexity and difficulty of the case; it had never been part of the agreement on which the decree was based that the ratio of Shs. 201,000/- to Shs. 70,000/- should govern the instruction fee.

Finally, as regards the first issue, counsel submitted that the learned judge had not attached sufficient significance to the fact that costs had been awarded

on the higher scale. In itself, this made relatively little difference to the bill, since the higher scale applies only to attendances, but having regard to the wording of para. 50 of the Advocates (Remuneration) Order, the award must be construed as a clear indication to the taxing officer that the special grounds referred to in that paragraph were here present. I think this is a relevant consideration.

Counsel for the respondent relied on three propositions. The first was that while the taxing officer has a discretion which should not be interfered with except on grounds of principle, it is accepted law that an extravagant amount may in itself indicate a misdirection, and he argued that the judge has a discretion to decide when the quantum awarded is so excessive as to indicate an error of principle.

His second proposition was that, on a true interpretation, the consent decree meant that the instruction fee should not include any element in respect of the counterclaim. He argued that the taxing officer, in dealing specifically with the instruction fee, had referred to the counterclaim, in terms that indicated clearly that it had been a factor influencing his assessment.

Thirdly, counsel argued that the taxing officer had not taken sufficiently into account the first proviso to item (1) of Schedule VI of the Advocates (Remuneration) Order. He pointed out that various matters, particularly relating to the perusal, copying and marking of documents and plans are duplicated in the item for instructions and in the detailed items of the appellant company's bill.

I think the law is clear and well known; it is only the application of the law that causes difficulty. An appellate court will not interfere with an assessment of costs by a taxing officer, unless the taxing officer has misdirected himself in a matter of principle, but if the quantum of an assessment is manifestly extravagant, a misdirection of principle may be a necessary inference.

I think the assessment of the instruction fee by the taxing officer was high, but I do not think the learned judge would have been entitled to interfere on that ground alone. However, I think there is merit in counsel for the respondents submission that the taxing officer was influenced in his assessment by the counterclaim. The taxing officer first observed that the appellant company's advocates had "a very heavy responsibility on their shoulders" by reason of the fact that the counterclaim far exceeded the claim in the suit. Later in his ruling, but still dealing solely with the instruction fee, the taxing officer referred to the fact that all work done in respect of the counterclaim was to be treated as work done in respect of the claim. I find it impossible to avoid the conclusion that, in assessing the instruction fee, the taxing officer did take the counterclaim into consideration and I think that in doing so he was wrong.

As regards the third point made by counsel for the respondent, it is quite true that there is a considerable apparent duplication between the details of the instruction fee and other items in the bill. On the other hand, the taxing officer expressly directed himself on the necessity to keep in mind the first proviso to item (1) of Schedule VI to the Advocates (Remuneration) Order and I do not think there is any reason to suppose that he failed to do so.

For the reasons I have given, I think the learned judge was entitled to set aside the taxing officer's assessment. It was strongly urged by counsel for the appellant that the learned judge should then have remitted the matter to the taxing officer, although, as counsel for the respondent pointed out, neither side had asked him to do so. Counsel for the appellant submitted, relying on *D'Souza v. Ferrao*, [1960] E.A. 602 and *Arthur v. Nyeri Electricity Undertaking*, [1961] E.A. 492, that although a judge undoubtedly has jurisdiction to re-tax a bill himself, he should as a matter of practice do so only to make corrections which

follow from his decision, and that the general rule is that where a fee has to be re-assessed on different principles, the proper course is to remit it to the same or another taxing officer. I would agree that, as a general statement, that is correct, adding only that it is a matter of judicial discretion.

We now have to exercise our discretion whether or not to interfere with the exercise of his discretion by the learned judge. In his Order, the learned judge said:

“ . . . the basic instructions fee on Shs. 201,000/- is Shs. 5,000/-. The Taxing Officer raised it to Shs. 27,000/- which is 5.4 times the basic figure.

If the claim had been allowed in the agreed sum of Shs. 70,000/- with costs and the counterclaim had been dismissed with costs, the basic instructions fee would have been Shs. 2,000/- on the claim and Shs. 500/- on the counterclaim. Multiplying these two figures by the Taxing Officer's factor of 5.4 we get a total of Shs. 13,500/-.

In agreeing to basing instructions fee on Shs. 201,000/- the parties must have thought to base it on Shs. 70,000/- would given an unduly low figure. They were in effect increasing the basic fee 2.5 times which I think was their own measure of the importance of the case. And this was a consent order. Was the Taxing Officer justified in increasing the increased fee 5.4 times? . . . As stated above, the multiplying factor agreed by the parties was 2.5 and this was in my opinion the parties own index of importance of the case. . . . It is not known why the Taxing Officer adopted the multiplication factor of 5.4. . . . It would have been proper, I think, to multiply the basic figure by 2.5 or 3 but not by 5.4.”

I think, with respect, that the learned judge erred in principle when he attempted to analyse the taxing officer's assessment and himself to reassess the instruction fee on the basis of formulae. In the first place, this Court has expressly disapproved of the use for this purpose of a multiplying factor. In *Arthur v. Nyeri Electricity Undertaking (supra)* this Court said:

“ . . . a taxing officer, when he has decided that the scale should be exceeded, does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved.”

I see no reason to suppose that in the present case the taxing officer ever considered multiplication factors.

Secondly, I see no reason to suppose that the figure Shs. 201,000/- was adopted by the parties as being a multiple of Shs. 70,000/-, which it is not. It bears no relation to the amounts in issue. I think it was clearly a nominal figure entitling the appellant company to the maximum scale fee for instructions, which applies in all cases over Shs. 200,000/-. On this question, I would agree with counsel for the appellant that the amount, if any, by which the instruction fee in any case is to exceed the scale fee is a matter for the taxing officer's discretion, bearing in mind all the recognised factors, particularly the complexity of the case.

If, as I think, the learned judge erred in principle, we must review his assessment and in my opinion his adoption of a multiplying factor led him to reduce the instruction fee too severely. I do not think we should substitute a figure of our own, because we are not familiar, as is the taxing officer, with current awards, and it is essential that there be the greatest possible consistency and sense of proportion in these matters. I would remit the matter to the taxing officer.

As regards the second part of the appeal, the appellant company's bill of costs had included a sum of Shs. 1,200/- paid to Messrs. Bridger & Harris for

advising on technical aspects of the case, Shs. 5,400/- paid to Mr. Harris for nine days attendance in court at Shs. 600/- per day and Shs. 2,000/- paid to Mr. Harris for two days when he gave evidence at Shs. 1,000/- per day. Mr. Harris is a consulting engineer practising under the name “Bridger & Harris” and had at one stage been employed by the appellant company in connection with the contract. The taxing officer had allowed all three of these items, but the learned judge struck out the first two, saying:

“The real need for an expert to sit behind the advocate throughout the hearing of a long case is not apparent to me. Technical matters come before Courts every day and advocates have to deal with them. They consult experts before coming to Court or ask for the adjournment of cross-examination of a particular witness to obtain further instructions. In any case, I see no need at all for an expert to sit behind the advocate at the cost of the other side while the witnesses of his own client are giving evidence. The presence of the expert may be convenient and useful to the advocate of his client, but is that really necessary?

I regard this as ‘overcaution’ on the part of the plaintiff Co. and Rule 16 requires expenses caused by overcaution to be taxed off.

I hold that Shs. 1,200/- under this Item has not been allowed properly and I allow the appeal on this point.”

And later:

“I have already held under Item 272 that a daily charge cannot be allowed against the opposite party in respect of an expert present in Court for the purpose of advising his own client’s advocate.

I, therefore, reduce the amount allowed under Item 274 by the sum of Shs. 5,400/-.”

Counsel for the appellant argued that these passages, which appear to lay down a general rule, go much too far. He submitted that there must be cases so technical that the presence of an expert is essential. An application for an adjournment to take instructions might well be refused on the ground that the applicant should have had any necessary advice available. Moreover, the presence of the expert in court while other witnesses are giving evidence may materially shorten his own examination.

I would agree with counsel for the appellant to this extent, that if the learned judge was laying down a general rule, it was wrong, but I do not think that was his intention. I do not think he intended to go beyond the facts of the present case, and on those facts, with respect, I agree with him. Certainly I do not see how the respondent company could properly be asked to pay the costs of the expert’s attendance in court while the appellant company’s own witnesses were giving evidence. I have no doubt that the learned judge was right to strike out the item of Shs. 5,400/-.

As I have said, the item of Shs. 1,200/- appeared in the appellant company’s bill of costs as “for advice on technical aspects of the case”. From this it would appear to have been the witness’ fee for qualifying himself and as such it might not have been unreasonable. On reference to the witness’ own bill, however, it appears that he was claiming for two days “attending you in court and advising you on the technical aspects of the case” and that this claim is on exactly the same footing and at the same rate as the claim for attendance in court for nine days. I do not know why separate bills were rendered, but it would seem that the witness was in fact claiming for thirteen days in court, eleven in an advisory capacity and two as a witness, thus covering the whole of the hearing. On this basis, I think the learned judge was justified in striking out this item also.

Counsel for the respondent raised the question whether, if the matter were to be remitted, it should be remitted to the same or another taxing officer. He made it clear that in doing so he was making no reflection on the taxing officer personally. Where a case is remitted, there is sometimes an advantage in its coming before a different officer, who can bring a fresh mind to it. On the other hand, so far as the present case is concerned, the taxing officer is familiar with what is admittedly a complex case, no objection has been taken against him and I understand that there is no other officer of comparable experience. I think these considerations prevail.

I would accordingly allow the appeal to this extent: I would set aside the learned judge's re-assessment of the instruction fee and remit it to the taxing officer who previously taxed it, with a direction to re-assess it on the usual principles, bearing in mind the various factors mentioned above, but excluding from his mind any consideration of the fact that there was a counterclaim, and I would set aside the learned judge's re-assessment of the getting up fee and direct the taxing officer to re-assess it at one-third of the instruction fee as reassessed by him. In all other respects, I would dismiss the appeal. I would leave unchanged the order for costs in favour of the respondent company in the High Court but I would allow the appellant company three quarters of the costs of the appeal.

Sir Charles Newbold P: I have had the advantage of reading in draft the judgment of Spry, J.A., and, subject to what I set out below, I agree with it.

I endorse the reference by Chanan Singh, J., to the words of Briggs, J.A., in *Taj Deen v. Dobrosklonsky*, [1957] E.A. 379.

In my view the instruction fee allowed by the taxing officer was too high in relation to the amount recovered and having regard to other items allowed in the bill. Further the taxing officer clearly had regard to the counter-claim in arriving at the quantum for the instruction fee: this he should not have done. While Chanan Singh, J., in my view, stressed too greatly certain arithmetical factors, I do not understand him to be using those factors in order to arrive at the proper quantum but to be using them in order to emphasise and highlight the excessive amount of the instruction fee allowed by the taxing officer.

There will be an order in the terms proposed by Spry, J.A.

Duffus VP: I agree with the judgment of Spry, J.A.

Appeal allowed in part.

For the appellant:

P. Le Pelley (instructed by *Hamilton Harrison & Mathews*, Nairobi)

For the respondent:

F. R. S. De Souza (instructed by *F. R. S. De Souza & Co.*, Nairobi)

Bugerere Coffee Growers Ltd v Sebaduka and another
[1970] 1 EA 147 (HCU)

Division: High Court of Uganda at Kampala

Date of judgment: 16 July 1969
Case Number: 546/1968 (135/69)
Before: Youds J
Sourced by: LawAfrica

[1] Company – Director – Removal – By shareholders – Notice required of meeting – No special form or separate notice required where removal resolved at meeting properly requisitioned for the purpose – Companies Act (Cap. 212), ss. 132, 142, and 185 (U.).

[2] Company – Meeting – Requisition by shareholders – Requisition may consist of several documents in like form – Companies Act (Cap. 212), s. 132 (U.).

[3] Company – Meeting – Notice of meeting – Meeting requisitioned by shareholders to remove directors – No special form or separate notice required – Companies Act (Cap. 212), ss. 132, 142 and 185 (U.).

[4] Company – Proceedings by – Authority for – Must be given by resolution of members or directors.

[5] Costs – Advocate, against – No authority – Action instituted by advocate in name of company without any resolution of company or directors giving authority – Action dismissed and costs ordered to be paid by advocate.

Editor's Summary

A meeting of the members of the plaintiff company was requisitioned under s. 132 of the Companies Act by shareholders holding between them more than one-tenth of the paid-up capital of the company, by means of three separate documents duly served on the company. The directors having failed to call a meeting the requisitionists called one themselves, at which a resolution was passed removing the directors and appointing others, of which resolution the notice calling the meeting gave particulars. This action was then brought in the name of the company challenging the appointment of the new directors. It was argued (*inter alia*) that the requisition was invalid because three separate forms had been used; that the meeting was improperly constituted because inadequate notice of it has been given; and that the meeting could not validly remove the directors because special and separate notice is required of a resolution to remove a director and such notice had not been given or given in time. It was objected by the defendants at the outset that the action was incompetent because the company had given no authority for it to be brought.

Held –

- (a) it was in the interests of all concerned for the substantive issue to be decided, notwithstanding the preliminary objection about lack of authority;
- (b)
 - (i) the requisition was valid by virtue of s. 132 (2) of the Companies Act, which provides that a requisition may consist of several documents in like form;
 - (ii) the meeting was, on the facts, properly constituted;
 - (iii) the meeting was capable of passing a resolution removing the directors, no separate notice of such resolution being necessary and adequate notice of intention to move it having been

given;

(iv) the new directors were validly appointed;

- (c) (i) when companies authorise the commencement of legal proceedings a resolution or resolutions have to be passed either at a company or Board of Directors' meeting and recorded in the minutes; no such resolution had been passed authorising these proceedings;

- (ii) where an advocate has brought legal proceedings without authority of the purported plaintiff the advocate becomes personally liable to the defendants for the costs of the action (*Danish Mercantile Co. Ltd. v. Beaumont* (1) adopted);
- (iii) the advocates should be ordered to pay the costs.

Action dismissed. Costs to be paid by the advocates for the purported plaintiff.

Case referred to in judgment:

(1) *Danish Mercantile Co. Ltd. v. Beaumont*, [1951] 1 Ch. 680.

Judgment

Youds J: This action was started by a plaint dated 17 December 1968 filed by Messrs. Parekhji & Co., Advocates, of Ratablo House, William Street, Kampala. The action is brought in the name of the Bugerere Coffee Growers Limited, which concern is described in paragraph 1 of the plaint as a limited liability company incorporated in Uganda and carrying on business at Kampala and elsewhere, and its address for service in the proceedings is stated as being “care of Messrs. Parakhji & Co., Advocates, Ratablo House, William Street, Kampala”. I make special mention of the manner in which the advocates have set out paragraph 1 of the plaint in view of the defence contention in paragraph 2 of the written statement of defence and taken as a main point before me at the trial, that Messrs. Parekhji & Co. had no instructions and no authority to bring this action in the name of the company, and that therefore this action ought to be dismissed with costs awarded against Messrs. Parekhji, the advocates.

If, of course, this defence contention is sound, and I have to hold on the evidence before me that Messrs. Parekhji & Co. had no authority to bring these proceedings and/or to act on behalf of Bugerere Coffee Growers Limited, such findings would of themselves dispose of this suit and would entitle the defendants to judgment. However, I am mindful of the fact that Bugerere Coffee Growers Limited has had a very troubled and unstable history since its incorporation and that for some time past the company directorate has been under heavy and justified criticism from its member shareholders, so much so that in October and November last year a group of member shareholders moved to oust the board of directors from office and substitute a new board to manage the affairs of the company. Even this move has so far failed to produce any real stability and peace in the running and management of the affairs of the company, because these present proceedings were started last December seeking to challenge the legality of a meeting held on 18 November 1968 which purported to remove the old Board and appoint a new Board of Directors, and also seeking various declarations including a declaration that the newly appointed directors have no legal authority to act as directors and manage the affairs of the company.

It is, of course, of supreme importance to the unfortunate member shareholders of this company that there should be a clear ruling given by this court at the earliest possible moment as to which group of directors is legally appointed and entitled to manage the affairs of the company, and it would not be in the interests of the company or of its shareholders, with whom I have the utmost sympathy, if I were to decide this present action merely on a preliminary issue and finding that the advocates who started these proceedings and who are purporting to act on behalf of the company, had and have no right or authority so to act or to bring these legal proceedings in the name of the company. Indeed both parties have specifically asked me to give clear rulings and decisions on the

real issues in dispute between them, which are: (1) whether a meeting held on 18 November 1968 purporting to be an extraordinary general meeting of the company was or was not a properly constituted meeting of the company; and if so (2) whether such a meeting was capable of passing a resolution or resolutions removing one group of directors from office and appointing a new group of directors to manage the affairs of the company. I therefore propose to rule on these main issues in the fervent hope that, by so doing, all parties will know where they stand and that nobody will be left in any doubt as to what, if any, group of directors is legally entitled to act for the company and is now responsible for the management of its affairs.

In deciding these main issues, it is first necessary to go back to August 1968. At that time, the Board of Directors was eleven in number including a Mr. Lwanyaga-Kalya who was also Secretary of the company, and their names appear in a printed form of annual return which was drafted by the then auditor of the company, a Mr. Ramnik Shah, in readiness for submission to the Uganda Registrar of Companies and which is exhibited. That form never reached the Registrar of Companies, and Mr. Shah, when giving evidence before me, suggested that it was an oversight on his part that it was not sent off to the Registrar. I do not accept his evidence on this point and find that the printed form was purposely withheld and was never sent on to the Registrar of Companies because the accounts and balance sheet which should have accompanied it had not been passed at either of the two general meetings of the company called for 3 August 1968 and then by adjournment on 7 September 1968.

I had evidence given by witnesses from both sides as to what transpired at these two meetings. On the plaintiff's side the said Mr. Lwanyaga-Kalya and Mr. Shah gave evidence, and on the defendants' side, a Mr. Kyankonye and the first defendant, Mr. Sebaduka, gave evidence. I much preferred the evidence given by the witnesses on the defendants' side as to what happened at the two meetings, and for these reasons: (1) I found Mr. Lwanyaga-Kalya to be a thoroughly unreliable and shifty person when giving his evidence and he was quite prepared to say and do anything if he considered it helped his own personal interest. (2) As Secretary of the company, it was his responsibility to have and keep proper minute books in which to record all business transacted at meetings both of the company and of the Board of Directors; yet he has not produced any minute book at all relative to meetings of the Board of Directors and he has merely produced two unimpressive typewritten documents which he says are English translations of minutes which he has recorded in minute books in Luganda. I do not accept his evidence that either of these typewritten documents are true and faithful records of what happened at either of the meetings to which they refer and so far as one document is concerned, it is a deliberate misrepresentation made by him of what happened at the general meeting on 7 September 1968. (3) I am sure that the balance sheet and accounts of the company for the year ended 31 August 1967 which were being presented to the meeting some 12 months late on 7 September 1968, were never likely to be and were never in fact adopted and passed by that meeting and it was a complete fabrication and lie on the part of the Secretary, Mr. Lwanyaga-Kalya, to record and state in his typewritten document that the accounts were adopted after a "few questions". (4) If the accounts had been passed at the meeting, then why was there any delay or failure on the part of Mr. Shah, the auditor, to send off the printed form of annual return and its accompanying balance sheet and accounts to the Registrar of Companies. (5) As regards Mr. Shah's evidence as to what happened at the two meetings, he frankly admitted that he could not understand much of what was going on, because the persons at the meeting were speaking in Luganda which language he did not understand.

I accept without hesitation the evidence of the witnesses for the defence that the annual general meeting called for 3 August 1968 broke up in disorder and confusion when and after the balance sheet and accounts of the company were put before the meeting. I also accept that trouble again arose at the adjourned meeting on 7 September 1968 for the same reason that member shareholders were completely dissatisfied with the balance sheet and accounts which were being presented nearly 12 months after the accounting period to which they related and which disclosed a thoroughly unsatisfactory financial position, with no money available for payments of dividends then or in the foreseeable future. I am further satisfied that at this same meeting there were calls for resignations of the then Board of Directors and it was a complete falsity for the Secretary, Mr. Lwanyaga-Kalya, to record in his typewritten document that the retiring directors (amongst whom he himself was included) were re-elected “without division”.

I am satisfied that the meeting of 7 September 1968 did also break up in disorder and confusion at about 4.30 p.m., leaving the then Board of Directors in the meeting hall and that a group of dissatisfied member shareholders there and then decided that a special meeting of the company must be requisitioned and requested to deal with the thoroughly unsatisfactory position. Thereafter legal advice was taken, resulting in a number of shareholders signing forms requisitioning and requesting the directors to convene an extraordinary general meeting of the company.

It was admitted by Mr. Lwanyaga-Kalya in evidence that he did receive three forms requisitioning the directors to call an extraordinary general meeting, together with a covering letter dated 1 October 1968 from a Mr. S. W. Munabi, advocate acting for the requisitionists. Mr. Lwanyaga-Kalya further admitted that he received the letter and forms of requisition at the registered office of the company; and in his capacity as Secretary of the company, he convened a meeting of the company directors which met on 18 October 1968. He told me in evidence that he recorded the minutes of that Board of Directors’ meeting in Luganda, but he did not produce any minute book or other document containing the original minutes written in Luganda and he merely produced to the court what he described as a translation of the minutes into English.

In his evidence before me, Mr. Lwanyaga-Kalya repeated more than once that he and his co-directors decided at their meeting on 18 October 1968 that the requisition notices were bad and invalid because the requisitionists did not hold shares totalling one-tenth of the paid-up capital of the company. In the typewritten document purporting to record the minutes of that directors’ meeting, the objection recorded as having been taken to the requisition was – I quote – “none of the three requisitions complied with the provisions of s. 132 of the Companies Act. Not a single one of these three requisitions was signed by persons holding one-tenth of the issued capital of the company.” There is, therefore, a difference between the objection taken to the requisition by Mr. Lwanyaga-Kalya in his sworn evidence before me and the objection taken to the requisition in the typewritten document purporting to be the recorded minutes of the Board meeting; but as both objections have been taken either in evidence or in legal argument before me, I must deal with both objections and see whether there is any substance in either of them.

Dealing first with the objection that the requisition was invalid because it was not supported by requisitionists holding one-tenth of the paid-up capital of the company, s. 132 (1) of the Companies Act provides that the requisition needs to be made by members of the company holding at the date of the deposit of the requisition not less than one-tenth of the paid-up capital of the company. When Mr. Shah, who was company auditor certainly up to 18 March 1968,

gave his evidence before me, he agreed that the last available records of the company made up in September 1968 showed that there was a paid-up share capital of 4,036 shares of Shs. 100/- each and that 10 per cent. of this paid-up capital would give a total of approximately 404 shares. With the requisition notices submitted totalling 507 shares, this was over the 10 per cent. required by s. 132 (1) of the Act. In the light of this evidence and of the facts established thereby, there was certainly no substance whatever in the objection taken to the requisition by Mr. Lwanyaga-Kalya in his testimony before me.

The second objection taken is that because three separate forms or documents were used to make the requisition and not one of the forms was signed by persons holding one-tenth of the issued capital of the company, s. 132 of the Act had not been complied with and the requisition is bad. This objection I also find to be without substance or merit and to be the result of confused thinking on the part either of the then Board of Directors or of their advocate who have lost sight of s. 132 (2) which provides that a requisition *may consist of several documents in like form each signed by one or more requisitionists*. The situation as I find it was that there was one requisition consisting of three documents in like form, the objects of the meeting were stated in each of the three documents and the requisitionists all signed. The one requisition was supported by members of the company holding 507 shares, which was well over the one-tenth requirement called for by s. 132 (1) of the Act.

I therefore have no hesitation in deciding and finding that the requisition did comply with s. 132 of the Companies Act and that the directors had no valid ground for treating the requisition as bad and for not convening an extraordinary general meeting of the company as they had been requested to do.

The Board of Directors having refused and failed to convene any meeting of the company within 21 days of the date of deposit of the requisition, the requisitionists then became entitled to convene a meeting under and by virtue of s. 132 (3) of the Companies Act, and this they proceeded to do by printed notice issued to shareholder members and through the press. This printed notice was signed by three requisitionists who between them held 255 shares which represented more than one-half of the total voting rights of all the requisitionists. Mr. Lwanyaga-Kalya admitted that he received the notice when it arrived at the registered office of the Company, though he did seek to make the subtle distinction that he only received the notice in his capacity as Secretary of the company and not in his capacity as shareholder. Of more importance to me than to listen to his subtle distinctions was to find out what, if anything, he did about the notice of the convening by the requisitionists of the extraordinary general meeting for 18 November 1968 when he received it, and his answer was that he did nothing either in the way of calling another directors' meeting to consider the new situation or of trying to stop the holding of the meeting. He said he did nothing to try and stop the holding of the meeting because his lawyer had gone on leave, but I do not for one moment accept this as a true or valid explanation as to why he did nothing to try and stop the holding of the meeting. He further admitted that he himself did not attend the meeting on 18 November 1968 when, if he had had the courage of his own convictions and had really and truly thought the meeting was improperly constituted, he could have voiced his protest as soon as the meeting started.

I find without any hesitation that the meeting held on 18 November 1968 was a properly constituted meeting of the company and I further find that adequate and proper notices were sent to member shareholders of the holding of such meeting.

The other main issue and question I have to decide is whether the meeting of 18 November 1968, which I have found to be a properly constituted meeting

of the company, was competent and capable of passing resolutions removing the then existent Board of Directors from office and appointing a new Board of Directors to take their place and manage the affairs of the company. It was argued by counsel for the plaintiff that s. 185 (2) of the Companies Act requires a “special notice” to be given to the company of any resolution to remove a director before the expiration of his period of office or to appoint somebody to replace him, and that if that subsection is read in conjunction with s. 142 of the Act, the special notice of the resolution must be given to the company not less than 28 days before the meeting at which the resolution is to be moved. Counsel for the plaintiff further asserted that the special notice must be given in a special form and that it was insufficient merely to give the notice in the manner of a printed form giving notice of the date of the meeting and the agenda for such meeting. In other words, counsel contended that two notices ought to have been given, one relative to the holding of the meeting and setting out its agenda, and a second special notice setting out the resolution to remove the directors.

Dealing first with the contention that 28 days’ notice was not given to the company of the intention to move the resolution removing the old 11-strong Board of Directors and replacing them with new directors, it was admitted by Mr. Lwanyaga-Kalya that in his capacity as Company Secretary he received the written notice and forms of requisition and advocate’s covering letter at the beginning of October 1968 and the notice and forms clearly stated that a special resolution was to be moved whereby all the present and current members of the Board of Directors – and they were all specified by name – were to be removed from office and s. 185 of the Companies Act was expressly referred to in the notice and forms. Mr. Lwanyaga-Kalya further gave evidence that he acquainted all his co-directors with the notice he had received and that he called a meeting of the Board of Directors which took place on 18 October 1968. I find therefore that notice of the resolution which was intended to be moved removing the old 11-strong Board of Directors from office and appointing a new Board was given to the company sometime during the first week of October and most probably on 2 October 1968, and that it was repeated to the company by the printed notice which I find was delivered to the company on the 24 October 1968, which was the day after the printed notice was signed by the three requisitionists. Again in the printed notice s. 185 of the Companies Act was specifically mentioned. In all these circumstances, it is quite unrealistic for counsel for the plaintiff to assert that the old Board of Directors had had insufficient notice of the resolution removing them from office and which was intended to be moved at the extraordinary general meeting held on 18 November 1968. The directors knew all about the intended resolution during the first week in October and certainly by 18 October 1968 when they purposely met to consider their position, and even the date of this Board meeting was some 31 days before the company meeting took place. But even if it might be said that the old Board of Directors had not had a full 28 days’ clear notice of the date of the holding of the extraordinary general meeting when the resolution removing them from office was to be moved, the proviso to s. 142 of the Companies Act cured any possible defect regarding length of notice by providing that “if a meeting is called for a date twenty-eight days or less after the notice has been given, the notice though not given within the time required by this subsection, shall be deemed to have been properly given for the purposes thereof”.

I find therefore that there is no merit or substance in counsel for the plaintiff’s argument that inadequate notice was given of the intended resolution to remove the old Board of Directors, and as to his further argument that the special notice must be given in a set form and separate and apart from any other notice or notices, I can find nothing in ss. 142 or 185 of the Companies Act which supports his argument and says that the notice has to be in a set form and

separate and apart from everything else. Provided the notice of intended resolution is clear and all concerned know and understand what is meant and intended by it, it clearly complies with the Act.

I accordingly find that adequate and proper notice was given of the intention to move the resolutions removing the old Directors from office and appointing new directors and that the extraordinary general meeting held on 18 November 1968 was therefore competent and capable of passing such resolutions. I have been shown the new minute book which was used for recording the proceedings and businesses transacted at the meeting on 18 November 1968 and I have heard the oral evidence of two witnesses called for the defence as to what took place at the meeting. Apparently none of the old eleven-strong Board of Directors chose to attend the meeting to protest or argue about their removal from office, and this ostrich-like attitude on their part merely confirms my view that the majority of them realised they had lost the confidence of the member shareholders and their removal from office was both inevitable and justified in the interests of the company.

I therefore find that the new group of directors appointed at the meeting on 18 November 1968 are the duly-appointed directors of the company and are legally competent to act and make decisions in and concerning the management and running of the company. I should perhaps for completeness state that I find Mr. Lwanyaga-Kalya is still Secretary of the company, but I am sure that I do not need to advise the new Board that early steps should be taken to remove him from that office. He had to admit in evidence that he has made no entry whatever in the Register of Members of the Company since August 1965, that the company was badly in default in submitting its annual returns to the Registrar of Companies and he sought to blame Mr. Shah, the then auditor, for this neglect. I have still to see the minute books which he says that he kept for recording meetings of the company and of its Board of Directors, and in all these circumstances, I can only describe him as a thoroughly incompetent and unscrupulous secretary.

Lastly I have now to return to and deal with the preliminary point raised by the defence in their pleadings and before me at the trial, that Messrs. Parekhji & Co., the advocates who filed and conducted these proceedings in the name of the company, had no authority or instructions so to act. Mr. Dholakia, the senior partner in that firm of advocates and who has conducted these proceedings on the plaintiff's side, was asked by me in the course of his concluding address to the court and after all the evidence in the case had been given, to state where was his authority for acting and bringing these present proceedings in the name of the company. He was quite unable to point to or produce any entry in any minute book either of the company or of the Board of Directors authorising his firm of advocates to act on behalf of the company, much less to institute these present legal proceedings on the company's behalf. He did refer to a minute recorded at the Board of Directors' meeting on 18 October 1968 and contained at the end of the typewritten document but when it was pointed out to him that this merely referred to seeking legal advice and did not even begin to provide authority for his or any other firm of advocates to institute proceedings for or in the name of the company, he then handed in a document to the Court bearing a date 18 November 1968, and consisting of a form of letter addressed to his firm and purporting to authorise his firm "to commence such proceedings in the Court of law as you deem fit necessary or as may in your opinion be in our interest". The letter then purports to be signed by two directors of the company.

Unfortunately for Mr. Dholakia, Mr. Lwanyaga-Kalya, who appears to be one of the signatories of the letter, had already given evidence in the course of

the trial to the effect that no Board meeting was held after 18 October 1968 and therefore no full Board of Directors' meeting or indeed any form of directors' meeting could have met on or about 18 November 1968 or could have given any authority to the firm of advocates to commence these proceedings. In point of fact, the evidence of Mr. Kalya was that at this very point of time his advocate was away on leave and he was therefore unable to do anything to stop the holding of the meeting on 18 November 1968. I find that the letter which Mr. Dholakia handed into the court was and is a highly suspect document, that it is not worth the paper it was written upon as an authority from the company and could not possibly constitute a lawful and proper authority from the company to the firm of advocates whereby they were to act and commence legal proceedings in the name of the company and on its behalf. When companies authorise the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors' meeting and recorded in the minutes, whereas in the present case I find no company or Board meetings were held on or about 18 November 1968, apart from the extraordinary general meeting which certainly did not authorise Messrs. Parekhji & Co. to start these or any proceedings on behalf of the company.

Clearly Messrs. Parekhji & Co. had no authority to act on the company's behalf or to bring these present proceedings in the name of the company.

On all grounds, therefore, this action fails and must be dismissed.

With regard to the payment of the successful defendants' legal costs, I have found that Messrs. Parekhji, the firm of advocates who filed and started these proceedings in the name of the company, had no authority so to do or act, and the general principle is that where an advocate has brought legal proceedings without authority of the purported plaintiff, the advocate becomes personally liable to the defendants for the costs of the action. This principle was propounded and applied in this Court in Civil Suit No. 349 of 1967 by Phadke, Ag. J., following the English case and decision in *Danish Mercantile Co. Ltd. v. Beaumont*, [1951] 1 Ch. 680.

In answer to this general principle and rule that an advocate becomes personally liable for costs when he starts and conducts legal proceedings on behalf of a purported plaintiff from whom he has no instructions or authority so to act, counsel for the plaintiff urged that he ought not to have to pay the defendants' costs because they (the defendants) ought to have taken the preliminary point at the outset of these proceedings to have the action struck out and the plaintiff non-suited. I very much doubt whether in the particular circumstances of this case the defendants would have been successful in having the action struck out or stayed at its inception when the main point of the action involved a determination of the issue as to what group of directors was clothed with authority to act and make decisions on behalf of the company. I doubt whether any costs could or would have been saved by an early application on the defendants' part to have the action struck out or stayed on the ground of lack of authority to bring the proceedings.

In so far as I have a discretion over awarding costs, I consider it would be monstrous to order this unfortunate and troubled company to have to pay the successful defendants' costs. Whilst I hope the company and its member shareholders will ultimately benefit from this present litigation by having had the position clarified as to what group of directors and persons are responsible for its control and management, nevertheless the company ought not to have to foot the bill and pay the legal costs of such litigation, all of which have been incurred because Messrs. Parekhji chose to start these proceedings.

I therefore order that the costs of the successful defendants be paid by Messrs.

Parekhji & Co., the advocates on the court record for the purported plaintiffs, and such costs will include a certificate and allowance for two counsel on behalf of the defendants.

Action dismissed. Costs to be paid by the advocates for the plaintiffs.

For the plaintiff:

B. D. Dholakia (instructed by *Parekhji and Co.*, Kampala)

For the defendants:

G. Binaisa Q.C. and *J. G. Wanume-Kibedi* (instructed by *Binaisa and Co.*, Kampala)

Lulume v Coffee Marketing Board [1970] 1 EA 155 (HCU)

Division: High Court of Uganda at Kampala
Date of judgment: 23 July 1969
Case Number: 491/1968 (136/69)
Before: Dickson J
Sourced by: LawAfrica

[1] *Contract – Implied term – Principles – No term to be implied unless it must be taken to have been mutually intended and necessary to give business efficacy to the document.*

[2] *Master and Servant – Contract of Employment – Term of employment – Pension scheme – Admission of employee to scheme does not imply that his employment cannot be terminated by notice.*

[3] *Master and Servant – Contract of Employment – Termination – By notice – Three months reasonable for labour officer – Ability to get a job quickly relevant but not only criterion.*

[4] *Master and Servant – Contract of Employment – Termination – Incidental benefits – Servant not entitled to free housing etc. after being given salary in lieu of notice.*

Editor's Summary

The plaintiff, having been employed by the defendant as a labour/welfare officer, was dismissed by payment to him of three months' salary in lieu of notice, and was required to leave the house provided for him seven days thereafter. He sued for damages for wrongful dismissal, contending that, having been made a member of the defendant's pension scheme, it was an implied term of his contract that he was a permanent member of the defendant's staff and could not be dismissed; and that three month's notice was inadequate.

Held –

- (i) no stipulation should be implied in a contract unless, upon evidence, it must be taken to have been mutually intended and necessary to give business efficacy to the document (*The Moorcock* (1) adopted);
- (ii) the rules of the pension scheme clearly contemplated dismissal;
- (iii) membership of the pension scheme did not imply immunity from dismissal (*Ward v. Barclay Perkins and Co. Ltd.* (3) adopted);
- (iv) on the facts (including the plaintiff's ability to get another job) three months' notice was reasonable;
- (v) the plaintiff's rights as an employee ceased upon the payment to him of salary in lieu of notice and he was not thereafter entitled to any incidental benefits such as free housing (*Wakiro v. Bugisu* (3) followed).

Suit dismissed with costs.

Cases referred to in judgment:

- (1) *The Moorcock* (1889), 14 P.D. 64.
- (2) *Rayzu Ltd. v. Hannaford*, [1918] 2 K.B. 349.
- (3) *Ward v. Barclay Perkins and Co. Ltd.*, [1939] 1 All E.R. 287.

(4) *Wakiro v. Committee of Bugisu Co-operative Union*, [1968] E.A. 523.

Judgment

Dickson J: This is an action brought by the plaintiff against the defendants claiming damages for wrongful dismissal.

The defendants are a corporate body established under s. 32 of the Coffee Act (Cap. 230) with powers to sue and be sued.

The following facts were admitted or proved:

1. On 6 August 1966 the plaintiff was offered the post of labour officer with the defendants on a six months' period of probation on the terms set out in the letter Exhibit A.
2. On 9 August 1966 the plaintiff accepted the offer and started work with the defendants on 26 August 1966.
3. By letter dated 15 March 1967 (Ex. O), the plaintiff was informed that on successful completion of his probationary period he had been confirmed in his appointment as labour/welfare officer with effect from 1 March 1967.
4. By letter dated 20 July 1967 (Ex. B) the plaintiff was informed by the defendants that his application for a loan of Shs. 70,000/- under the defendant's housing loan scheme (Ex. F) had been approved, to enable him to build a house at Plot No. 1182, Kisugu (Tank Hill). On 31 August 1967 a mortgage deed (Ex. G) was duly executed and which was signed by the plaintiff and the Deputy Chairman of the defendant Board, but the money (Shs. 70,000/-) was never collected.
5. By letter dated 22 March 1968 (Ex. D) the defendants terminated the plaintiff's employment. This document was signed by the Chairman of the Board. The relevant portion reads:

"It is with deepest regret that I have as a duty to pass on to you the decision reached by the Board this morning, terminating your employment with us, with effect from the above date.

 2. You will be paid three months' salary in lieu of notice; and by copy of this letter, I am instructing the Secretary to carry out the necessary formalities which should ensure that the Board's interests are fully taken care of before such payment is made.
 3. I take this opportunity of thanking you for everything you have contributed to our operations during your stay with us, and to wish you every success in your future employment."
6. The defendants' contributory pension scheme as outlined in the "Staff Pension Scheme Rules".
7. Payment by the defendants to the plaintiff by cheque (Ex. J), dated 28 March 1968, of Shs. 8,212/90, being three months' salary; 60 days leave pay; and refund of contributions to the pension scheme, and less the usual deductions.

In paragraph 12 of the plaint the plaintiff avers that, as a member of the permanent staff of the defendants and a pensionable officer, his appointment was not subject to summary termination without any reason being assigned and will therefore contend that his dismissal was illegal. In the same paragraph he states: "... and, further that the three months' salary paid to him by the Defendants in lieu of notice was absolutely inadequate to compensate him for the loss suffered as a result of this summary dismissal."

If I understand the aforesaid paragraph of the plaint rightly, it contains two legs. First, as a member of the permanent staff, he could not be given ordinary notice until possibly he reached the retirement age, that is to say the normal pension date, namely his fifty-fifth birthday, subject of course to good conduct and the continuance of the Board's business. No doubt when the plaint was drafted the Coffee Marketing Board Staff Pension Scheme Rules were in the mind of counsel. Secondly, it is contended that the money representing three months' salary is inadequate. I hope that I am not doing injustice to plaintiff's counsel when I say he appears to have resiled from the first leg as disclosed in paragraph 12 of his pleading and rested his contention on the second; unless (although he did not in my view expressly say so) he wished to use the first contention as a prop to his second. But as defendants' counsel, in my opinion aptly, submitted in his address, the scheme has very little value on the issue whether the notice is reasonable or not. Both in his opening and his final address, counsel for the plaintiff's contention was that the money paid to the plaintiff in lieu of notice was too inadequate, and not as is contended in what I call his first leg in paragraph 12 of the plaint.

In his opening he said:

"On 22/3/68, the defendant summarily dismissed the plaintiff without giving any reason for dismissal and paid him only three months' salary in lieu of notice. *It is the plaintiff's contention that having regard to the conditions of service the money paid to him in lieu of notice was too inadequate.*"

Then, in his final address he said at the very beginning:

"Issue to be determined is whether notice of three months reasonable."

Later he continued:

"Submitted, whether or not notice reasonable a question of fact which must be determined according to evidence adduced – authority for saying notice may vary from two days up to a complete year, depending on the nature of the job."

As the plaint raised the issue (although not pursued) that as a member of the permanent staff and a pensionable officer the defendant's appointment was not subject to summary termination without any reason being assigned, I will endeavour to deal with it very briefly. There is no doubt whatever that the plaintiff was a contributor to the staff pension scheme and the rules were applicable to him. The case of *Ward v. Barclay Perkins & Co Ltd.*, [1939] 1 All E.R. 287 is similar in many respects to the issue, and the facts though not identical would appear to be substantially the same.

In that case, the plaintiff was employed by the defendant company, who had established a staff endowment and pension scheme, to which the plaintiff had contributed for several years on the footing that he was a staff employee. The rules of that scheme indicated a distinction between employees in temporary or other employment and employees on the staff. "Staff employed" was defined as meaning "every male employee on the permanent staff". The defendants gave the plaintiff three months' notice to leave, as it appeared that there was no scope for advancement for him. No reflection of any sort was made upon his character, and so it is in the instant case. The plaintiff contended in that case that there was an implied contract that, if he came into the pension scheme, he became a member of the permanent staff; and that he thereby became subject to such considerations as health, good conduct and the continuance of the company's business, entitled to permanent employment, and could not be given ordinary notice until he attained the age of 65 and obtained the full benefit of his contributions. In the editorial note to the case as reported, it says it was

sought to suggest that the admission of an employee into a scheme for pensions for permanent staff of the company incorporated into the contract of service a term providing for permanent employment. It was admitted that this permanency must be subject to the health of the employee, his good behaviour and competence, and the main argument turned upon the meaning of the words “subject to the exigencies of the defendant’s business”, which it was contended did not prevent the permanency of the employment. The court construing the rules as a whole, and applying the principle of giving business efficacy to them, found no difficulty in negating the contention.

It was held that such a stipulation as the one propounded, could not be implied in a contract unless, on the evidence, it was shown to have been mutually intended, and necessary to give business efficacy to the document. That could not be said in the case, and the plaintiff, therefore, failed in his action.

Be it observed that Oliver, J., in his judgment (at p. 288) says that counsel for the defendants fully acknowledged that there was no complaint of any kind against the plaintiff. His work had been at all times satisfactory and there was absolutely no reason for getting rid of him beyond, apparently, that given to him – namely, that there was no scope for advancement for him. His Lordship went on to say, there was no other reason given, at any rate, no sort of justification for getting rid of him on the ground of any incompetence nor was misconduct even suggested. And so it is in the instant case, as exemplified in the letter terminating the plaintiff’s employment. In my view, that case would conclude against the contention put forward in the first part of paragraph 12 of the plaint.

Rule 1 of the scheme defines “employee” as a person in the permanent service of the employers ordinarily resident in East Africa and may include a full-time salaried director. Rule 4 (i) says once an employee is admitted to membership of the scheme, he shall not thereafter cease to be a member whilst he remains in the permanent service of the employers, except in the circumstances described in paragraph (j) of that rule. Paragraph (j) states:

“notwithstanding anything contained herein, if before the normal pension date a member shall –

(i) Cease to be employed in the permanent service of the employers, or

(ii)

or

(iii)

he shall cease to be a member . . .”.

Then provision is made that, in the event he ceases to be employed in the permanent service, his contributions will be refunded under rule 11 (iii).

The crunch comes in rule 16 which reads:

“16 Employers’ Right of Dismissal

Nothing in these Rules shall in any way restrict the right of the Employers or any of them to terminate the employment of any Member, and the existence or cessation of any actual or prospective or possible benefit under the Rules shall not increase or affect damages in any action brought against the Employers or any of them in respect of any termination of employment or otherwise.”

The position is made quite clear in rule 16. Then there is a rule which gives the employers a right to discontinue contributions and provision is also made for the determination of the trust and so on. I cannot do better, with respect,

than adopt a passage from the judgment of Oliver, J., in *Ward v. Barclay Perkins* (supra), at p. 289:

“Looking through these rules, I am bound to say that, far from finding it necessary to imply the stipulation, I should find the greatest difficulty in getting over the language of many of the rules if I were to imply it.”

It is a cardinal rule, as was pointed out in that case, that no stipulation ought to be implied in a contract unless, upon evidence, it must be taken to have been mutually intended and necessary to give business efficacy to the document: *The Moorcock* (1889), 14 P.D. 64.

Finally, it is not disputed that the Board is a creature of statute and is incorporated by an Act of Parliament. Under the provisions of s. 34 (2) of the Coffee Act it is entitled at any time to terminate the appointment of any of its officers.

I now pass on to the submission of counsel for the plaintiff concerning reasonable notice. The plaintiff is now 36 years old. His basic education is Higher School. It would seem that, immediately before taking up employment with the defendants, he was also working at Makerere as a labour/welfare officer, during which time, he studied by means of a correspondence course with the Metropolitan College, London, and after three years' study he obtained a diploma in personnel management from the Metropolitan College, and he was admitted into Membership of the Institute of Personnel Management. When he joined the defendants' Board, his salary was £1,320 p.a. in the salary scale of £1,200 p.a. * £60 p.a. to £1,800. At the time of his dismissal he was earning Shs. 2,300/- p.m. In addition, he enjoyed free housing and free medical and dental benefits both for himself and his family. Counsel for the plaintiff urges me that in deciding the issue whether three months' salary in lieu of notice is reasonable, regard must be paid to the nature of the plaintiff's employment. He stresses that employment of the kind for which he is qualified is difficult to obtain. According to the plaintiff's evidence he was unable to obtain employment as a personnel officer for eight months from the date of his dismissal. He eventually found employment with the East African Glass Works Ltd., on a temporary basis. His salary was Shs. 1,000/- per month – much lower than his previous employment with the defendants. He ceased working with the E. A. Glass Works Ltd. on 31 March 1969, after having taken up his appointment on 9 December 1968. Counsel for the defendant agrees with Mr. Sendege that whether notice is reasonable is a question of fact to be determined by the Court. When there is a contract of hiring of a workman and nothing is said on either side as to any notice to be given to determine the contract, it is an implied term that it can be determined only by either party giving reasonable notice: *Rayzu Limited v. Hannaford*, [1918] 2 K.B. 349. Counsel for the plaintiff says, having regard to the facts, three months is too short a period to enable the plaintiff to obtain a job similar to that which he was doing and that he should have been given six months' salary in lieu of notice.

The defendants called no evidence, and their counsel was content to rely on his submissions. He submits inter alia that the facts adduced in support of the unreasonable period for which salary was given in lieu of notice are not convincing. The fact that he says there are twenty organisations at least employing personnel officers, excluding the Government, and that he applied to only three, is a pointer that he has not taken reasonable steps to take a suitable job.

The plaintiff has not indicated in his evidence what would be reasonable notice. If I understand him rightly, he says it took him eight months to get a job, and a temporary one at that, after the defendants terminated his services and therefore by implication three months' salary in lieu of notice is inadequate.

Ability to get a job quickly is relevant in deciding the issue, but it is not necessarily the criterion. He contends that openings for personnel officers are scarce. On the other hand, according to his evidence there are a relatively small number of qualified personnel officers in Uganda, and if that is so, his chances of getting employment ought to be reasonably good. In my opinion, on his showing he has not made the efforts he should have in trying to get employment. If what he says is true, that there are about twenty organisations in Uganda employing personnel officers, and he made only three applications since leaving the defendants' employment, it cannot be said he has taken reasonable steps. In cross examination he states that he was waiting for advertisements. For a person of his apparent intelligence and education to make such an assertion is disingenuous. In this workaday world job seekers do not necessarily wait for advertisements. To be a personnel officer, I do not think it is a sine qua non to hold a diploma, though granted a person holding such, would, all things being equal, be able to command a better salary than one who does not hold one. According to his evidence, when he was employed at Makerere as labour/welfare officer he did not possess a diploma, he was studying for it. In my view, a payment of three months' salary in lieu of notice, having regard to the facts of the case, is reasonable. On the evidence the plaintiff has not shown it to be unreasonable.

It was a term of the plaintiff's employment that he and his family (wife and children) would be provided with free medical and dental treatment. It is submitted on his behalf that when his services were terminated he lost those benefits. In my opinion he would have to show that either he and/or his wife and children required that type of benefit and it was refused. Indeed, counsel for the plaintiff says, if notice is reasonable, his argument for loss of security would not hold. He concedes damages would have to be proved.

Under the housing loan scheme the plaintiff was eligible, on completing his probationary period, to receive a loan to purchase an existing property or to build a new house. According to regulation 8 of the scheme an application when made to the defendants must be accompanied by a plan and specification prepared by a qualified architect and estimates from two recognised contractors. The proposition would then be examined by the Board's professional valuer whose fees would be paid by the applicant whether or not a loan was granted. Under regulation 10, the loan would be issued in instalments against the reports from a recognised qualified architect or against certificates provided by the Board's valuer, and the fees involved would be paid by the borrower. The plaintiff says he spent Shs. 500/- for the building plan and Shs. 100/- on assessors fees. He claims he is entitled to recoup this amount from the defendants as a result of the termination of his services. It is clear from regulation 8 of the scheme that he had to incur these sums, notwithstanding no guarantee that the defendants would grant him the loan. In these circumstances, it is my view that he is not entitled to recover the sum Shs. 600/-.

The plaintiff says between August 1967 and December 1967 he spent Shs. 4,400/- after the approval of the loan. He says the expenditure was incurred on materials including terracing of the land, fencing and labour charges. He did not produce a single receipt to substantiate any of this expenditure. He was somewhat contradictory concerning the expenditure of Shs. 4,400/-. At first he said he spent a part of that amount before the approval of the loan, and thereafter he said none of that was spent before but afterwards. I am surprised that a man of his calibre did not keep any accounts of the expenditure. He expressly said he did not. If, as he says, he spent monies between August and December 1967, I wonder why he had not drawn any instalment against reports from an architect or against certificates of the Board's surveyor. He has not satisfied me that he spent Shs. 4,400/- as he says. In the absence of receipts or

other evidence I am not convinced. He is not entitled to any damages under this head.

It is conceded by the defendants' counsel that plaintiff did not live in the house provided during the entire period of three months immediately after the termination of his employment. The evidence is that he vacated the house seven days after, at the request of an officer of the Board. It is submitted that once the plaintiff's appointment was terminated there was no obligation in law for the Board to pay any allowance in lieu of house or to permit him to remain in the house provided.

In *Wakiro v. Committee of Bugisu Co-operative Union*, [1968] E.A. 523, it was held that the services of the appellants were terminated and they ceased to be officers of the respondent instantly they received the letter of dismissal and not three months later. That was a case in which the appellants were dismissed by payment of salary in lieu of notice. At p. 527 of the report Russell, J., said:

"It is clear that the appellants' employment was terminated the moment they received the letters of dismissal and they then ceased to be officers of the Society or have any rights as such to refer any disputes to the Registrar pursuant to s. 68 of the Act. It would have been otherwise if they had been given three months' prior notice of termination, as they would, in such event, have continued to be officers of the Society until the period of the notices had expired."

I respectfully agree with the learned judge's view. It follows, therefore, that once the plaintiff had been given salary for a certain period in lieu of notice, his rights as an officer of the defendants ceased, and he and his wife and children were not entitled to medical and dental treatment; free housing or an allowance in lieu thereof; and membership of the Housing and Pension Scheme.

Under s. 41 (1) (d) and (e) of the Coffee Act the Board is authorised respectively, subject to the approval of its estimates by the Minister, to use its assets for the payments of salaries, gratuities, pensions and so on to *its officers*; and to make loans to *its officers* and *employees*, for the purchase of bicycles and motor vehicles or for such other purposes as the Minister may approve. As has already been pointed out once an officer leaves the employment of the Board, he is no longer an officer, and that being so, it would be ultra vires the Act for the Board to pay any mortgage loan to him. Mr. Nyakabwa submits it would be an attempt to make the Board spend money which it had no authority to do. For the reasons mentioned above the plaintiff's claim fails and the suit is dismissed with costs.

Suit dismissed.

For the plaintiff:

J. Sendege (instructed by *Kiwanuka & Co.*, Kampala)

For the defendant:

V. W. K. Nyakabwa (Senior State Attorney, instructed by *Attorney General Uganda*)

Re Ibrahim and others
[1970] 1 EA 162 (HCU)

Division: High Court of Uganda at Kampala

Date of judgment: 23 July 1969

Case Number: 26/1969 (137/69)

Before: Jones Ag CJ

Sourced by: LawAfrica

[1] Constitutional Law – Fundamental rights – Protection of persons – Detention under emergency laws – Form of detention order – Must be in writing – No particular form required – Need not be served on detainee – Emergency Powers (Detention) Regulations 1966, reg. 1; Constitution of Uganda 1966, arts. 10 (2) and 21 (6) (a) (U.).

[2] Constitutional Law – Fundamental rights – Protection of persons – Detention under emergency laws – Observations on impropriety of using emergency laws to deal with ordinary crime.

[3] Prerogative Orders – Habeas Corpus – Detention under emergency laws – Court cannot go behind valid detention order.

Editor's Summary

The applicants were arrested and imprisoned. They applied for an order of habeas corpus. During the hearing detention orders were made against the applicants under the Emergency Powers (Detention) Regulations 1966. The advocate for the applicants at first conceded that these orders were valid and that the detention of the applicants could no longer be challenged; but after the hearing and before the Court had made its ruling he changed his mind and asked to be heard again. At the suggestion of the Court he filed a notice of motion and challenged the validity of the detention orders on the grounds (a) that the detainees should have been named in the order itself and not in an unsigned list attached to it; (b) the order had not been served on the applicants.

Held –

- (i) a detention order must be supported by a written order served on the person in whose custody the detainee is to be as his authority to detain the detainee; but
- (ii) such an order need not be in any particular form, nor need it be served on the detainee.

Observations on the impropriety of using emergency powers of detention to deal with cases of ordinary crime.

Order nisi discharged. No order as to costs.

No cases referred to in judgment.

Judgment

Jones Ag CJ: On 27 June 1969 Messrs. Kiwanuka and Company, advocates of Kampala, filed a notice of motion in the High Court of Kampala for an Order that a Writ of Habeas Corpus be issued to the Commissioner of Prisons, directing him to produce the bodies of 78 people who were the applicants and to answer upon what grounds he was holding them in Luzira Prison.

Counsel for the applicants averred that the detention of his clients was unlawful under s. 10 of the

Constitution.

The 78 applicants were made up of the following nationalities: 26 Gambians,

14 Mali, 11 Mauritians, 8 Senegal, 6 Sierra Leone, 4 Nigerians, 4 Congolese, 1 Liberian, 1 Guinean, 1 Burundi and one from the Ivory Coast.

Counsel for the applicants swore an affidavit that he had been authorised by His Excellency The Ambassador of Mali to Tanzania, Kenya and Uganda to represent all the applicants.

In his affidavit he deposed:

- (1) that between 15 and 17 June several of the applicants were seized by members of the Ugandan Police Force and sent to Luzira;
- (2) that on 23 June 1969 he went to Mr. Hassan, the Chief of C.I.D., at Kampala, who informed him:
 - (a) that the men were held under the Emergency Regulations; and
 - (b) could not be seen by anybody.
- (3) On 25 June 1969 he and the two other counsel for the applicants went to the Grand Hotel at the invitation of the Ambassador of the Republic of Mali. They were told by the Ambassador that he had been informed by an officer of the Ministry of Foreign Affairs that the applicants were not held under the Emergency Regulations, as their detention was not political, but that they were being detained for criminal offences, which they committed in Uganda. The Ambassador confirmed that statement later that day in writing. The letter was not, however, exhibited to the affidavit, neither was an affidavit sworn to that effect by the Ambassador on that day or any other day.
- (4) On 26 June 1969, after abortive attempts had been made on the telephone to speak to the Minister of Internal Affairs, he was side-tracked to the Minister's Permanent Secretary (at his direction) who informed him that the applicants were in fact held under the Emergency Regulations and could not be seen without permission.
- (5) Due to the ruling of Mr. Hassan, the applicants could not be contacted to swear affidavits on their own behalf.
- (6) That none of the applicants were Uganda nationals, but were foreigners who were in Kampala, where they were engaged in business or as tourists.
- (7) That the Government themselves would appear to be confused about the real reason why the men were in detention.

The notice of motion was heard by me on 28 June ex parte. I issued a Writ Nisi to be served on the Commissioner of Prisons returnable on the 4 July 1969.

All 78 applicants appeared before me on 4 July 1969.

Affidavits in reply to the notice of motion were served on counsel for the applicants as he was leaving for Court on the morning of 4 July. Some of the affidavits were filed in the Court Registry late on 3 July, or early on the morning of 4 July.

Not unnaturally, when the Court sat counsel for the applicants asked that he be given an opportunity to read and digest the affidavits, so that he could, if necessary, file affidavits in reply. He seemed to have been under the impression that the application would be dealt with on the affidavits alone. That is not so. He could have cross-examined the deponents on their affidavits. I granted the application, and the notice of motion was adjourned to 5 July 1969.

The affidavits which counsel wanted to study were filed by:

- (a) Senior State Attorney, who represented the Commissioner of Prisons;
- (b) Mr. Hassan, head of the Criminal Investigation Department;

(c) Mohamed Farooqi, who had been in charge of the enquiries;

- (d) Detective Senior Inspector Wauyo;
- (e) Mr. Okwonga, who was the officer in charge of the Upper Prison, Luzira.

Senior State Attorney said in his affidavit that he had failed to trace the official from the Ministry of Foreign Affairs mentioned in para. 5 of counsel for the applicants' affidavit dated 27 June 1969. Their affidavit had been served on him on 1 July, and to the best of his information and belief the 78 applicants were detained under the Emergency Powers (Detention) Regulations, 1966.

Mr. Hassan said that he was the head of the Criminal Investigation Department, Uganda. Early in June 1969 he received information of a confidential character from various sources indicating that a large number of *West African and Congolese nationals were engaged* in subversive activities. He immediately instructed Detective Assistant Superintendent Farooqi to make the necessary enquiries, who kept him informed of what he did, and he supported the steps taken by both the Uganda Police and the Prisons in what they did.

He admitted in his affidavit that on 23 June 1969 counsel for the applicants had contacted him as he claimed, and that he told him that the men were being detained under the Emergency Powers (Detention) Regulations (but not which one) 1966. He continued that delicate enquiries were going on and consequently it would not be in the public interest to see the men. In fact on 3 July 1969, Mr. Sengare, the Mali Charge d' Affaires, was permitted to interview the men of his nationality only.

Mr. Farooqi in his affidavit said that, acting on Mr. Hassan's instruction, he made enquiries and received further confidential information as a result of these enquiries. He reasonably suspected that all these people had acted, and were likely to continue to act, in a manner prejudicial to public safety and/or maintenance of public order. On 16 June a group of Uganda Police Officers under his command made a sweep in four areas in and around Kampala, namely Kisenyi, Kawempa, Mengo and Ntinda, and arrested all 78 men. Of the 78 people arrested, 72 were sent to Luzira on the 16th, whilst 6 were kept in the Central Police Station from 16 June to 3 July, when they were transferred to Luzira. He did not say why the 6 men were kept in the Central Prison or why it was decided to send them to Luzira on 3 July 1969, a day prior to the date fixed for the hearing of the motion.

Mr. Wauyo in his affidavit stated that acting on the information received from Farooqi he authorised the continued detention of the people mentioned in FZW.1, FZW.2, FZW.3, FZW.4 and FZW.5, FZW.6, which were exhibited to the affidavit. These were pro formas which necessitated the counter-signature of a Senior Superintendent of the police under reg. 3 (3) of the Emergency Powers (Detention) Regulations 1966, under which Regulations the detainees were being held. These pro formas were all counter-signed by Mr. Wauyo on 17 June 1969 as Senior Superintendent of Police.

Okwonga, the officer in charge of Luzira, deposed that he received into custody 72 of the 78 men on 18 June 1969, and the other six on 3 July 1969, i.e. two days after the notice of motion was served on Senior State Counsel, and one day before the hearing of the notice of motion.

The deponent also said that he satisfied himself that the people whose names were mentioned on the pro formas were the ones taken into detention, and were one and the same as the applicants now before the Court. He went on to say that the Mali Charge d' Affaires was permitted to visit the prison to interview 14 Mali nationals who were in detention on 3 July 1969.

A similar affidavit was filed by Samson Ochen, Acting Commissioner of Prisons.

During the adjournment granted at the request of counsel for applicants, he filed a counter affidavit in which he stated that the affidavit of Farooqi was wrong in respect of Solo Darbo and Serge Honing. To his own knowledge Darbo was not arrested on 16 June as stated in Farooqi's affidavit, as he was in custody in Jinja Road Police Station. Neither was it true that he lived in any of the places mentioned in para. 6 of Farooqi's affidavit, i.e. Kisenyi, Kawempa, Mengo or Ntinda.

As for Honing, he was a Belgian, who is a student, and had only arrived in Kampala on 15 June 1969, and was due to leave on the 17th.

Counsel for the applicants said that he served that affidavit in the afternoon of 4 July 1969; I certainly got my copy on that day.

At 5.00 p.m. on the same afternoon, Detention Orders under reg. 1, sub-reg. (1) of the Detention Regulations 1966, were allegedly served on the applicants at Luzira Prison. The Order was signed by the Vice President, who was holding the portfolio of the Minister of Internal Affairs.

When the Court sat on the morning of 5 July, an adjournment of thirty minutes was granted to enable certain affidavits to be sworn by Farooqi and Okwonga, the Senior Superintendent of Prisons, that Detention Orders signed by the Vice President were in fact served on the applicants. A copy of the Detention Order was presented to counsel for the applicants. How it was presented was the subject of later affidavits. Whatever the right or wrong of the recriminations set out in these affidavits, counsel did in fact receive it and read it, however cursorily.

He conceded that the Detention Order had been signed by the Vice-President on the 4th, i.e. the day before, and served on the applicants. In view of that, he said he could not challenge any longer the lawful detention of the applicants. He did however wish the Court to consider the effect of the detentions of these people from 16 June 1969, to 4 July. In particular he wished a ruling or guidance on whether the Police, Mr. Hassan in particular, had to condescend to particulars in his affidavit, of the facts on which he reasonably suspected that all the persons had acted, and continued to act, in a manner prejudicial to public safety and/or the maintenance of public order.

He contended that whereas the Court could not look behind a Detention Order issued by the appropriate Minister under reg. 1, sub-s. (1) of the Emergency Powers (Detention) Regulations, 1966, it was different with a police officer who purported to act under reg. 3 of the Emergency Powers (Detention) Regulations, 1966.

Senior State Counsel also invited me to rule or give opinions on these matters.

However, the matter did not rest there. I reserved my ruling on the affidavits and arguments placed before me.

A weekend intervened. Before I could start on my ruling a letter was placed before me from counsel for the applicants. It was dated 7 July and a copy was sent to Senior State Counsel who had appeared before the Court for the Commissioner. The letter read as follows:

"RE: H.C. MISCELLANEOUS CAUSE NO. 26/69
IN THE MATTER OF UGANDA VS. THE COMMISSIONER
OF PRISONS ETC.

The hearing of the above matter by the Acting Chief Justice Mr. Justice Jeffreys Jones, was concluded on Saturday the 5th instant and judgment was reserved.

2. Since then I have discovered that as a matter of law the Detention

Order filed in Court on 5th July 1969 attached to the Affidavit of Mr. M. A. Farooqi was irregular and therefore of no legal effect and, further, that the said Affidavit of Mr. M. A. Farooqi contains statements of fact which are false; and is very vague in certain aspects of it.

3. In the circumstances, I request, as a matter of urgency that His Lordship be asked to give the parties – The Commissioner of Prisons and the Applicants – an opportunity to be heard again on these very important legal issues. I suggest Tuesday morning (8th July, 1969) at 9.00 a.m.

Yours faithfully,

(Sgd.) B. K. M. Kiwanuka

for Kiwanuka & Company”

I could not act on that letter alone and normally would have ignored it. However as it raised some matters which I thought important, I sent for both counsel. I informed counsel for the applicants that one did not and should not deal with matters of this kind by correspondence. As there do not seem to be any rules of procedure covering a contingency of this kind, I suggested to the advocates that the only way I could see of bringing this matter before the Court was by notice of motion. I could see no other way. Counsel for the applicants promptly filed a notice of motion on 7 July 1969, in which he asked for a stay in any action the Court proposed to take until two matters were cleared, namely:

- “1. That the Order alleged to be a Detention Order in respect of all the Applicants does not comply with the provisions of the Regulations under which it was made and is not therefore a Detention Order within the meaning of the Regulations in question.
2. The Affidavit of Mr. M. A. Farooqi refers to Orders attached thereto which were in fact not there and were not in existence at the time when the Affidavit was sworn.”

It must be said that when Senior State Counsel appeared before me on 7 July he appeared perplexed if not sullen. The reason he vouchsafed to the Court on the 8th was that counsel for the applicants having conceded on the 5th that the Detention Order was valid, he could not see how he could impugn it at a later stage or how he could re-open the matter. He also attacked the notice of motion on the ground that it did not specify under what order or rules he moved the Court.

I will deal with the last point first.

Order XLVIII, r. 1 reads:

“All applications to the Court, save where otherwise expressly provided for under these Rules, shall be by motion and shall be heard in open court.”

and r. 3 is as follows:

“Every notice of motion shall state in general terms the grounds of the application, and, where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served with the notice of motion.”

Senior State Counsel’s notice of motion clearly states the grounds of the application in his notice of motion and there was no merit in that part of Counsel’s contention. Had not O. XLVIII covered the situation I would have been within my powers to invoke s. 101 of the Civil Procedure Code.

I had much sympathy, however, with Senior State Counsel in respect of his other points; but as counsel for the applicants had raised a matter which seemed

to me to go to the root of the detention of these people under reg. (1), sub-s. (1), I felt it right, in the interest of justice, to hear him in spite of the fact that he conceded on the 5th that he was “out of court” on the question of detention, in view of the Detention Order signed by the Vice President.

What was the burden of counsel for the applicants’ complaint? It was that on sober consideration he found that the Minister’s Order dated 4 July, was not a proper Order under reg. 1 (1). He attacked it on separate grounds. Firstly, the name of each detainee ought to have appeared on the face of the Order, but did not. It was not sufficient, he claimed, to refer to a list attached to the Order. Alternatively, if a list were permissible, the list itself ought to have been signed by the Minister so that it could not be added to. It had not been signed. Thirdly the Order was not served on the detainees as alleged by Farooqi in his affidavit dated 5 July. If they had, each detainee ought to have been asked to sign a duplicate. They were not so served and no one had signed a duplicate.

All this amounted to the fact that the Order issued by the Minister on 4 July 1969, and filed in Court on the 5th, was not valid under reg. 1 (1) of the Emergency Powers (Detention) Regulations.

Regulation 1 of the Emergency Powers (Detention) Regulations reads as follows:

“Whenever the Minister is satisfied that for the purpose of maintaining public order it is necessary to exercise control over any person, the Minister may make an order against such person directing that he be detained, and thereupon such person shall be arrested and detained.”

Senior State Counsel pointed out that nowhere does it say that the Order must be reduced to writing, or what form it should be in, if that were so. In fact he went on to say that the appropriate Minister could make an oral Order to detain a man.

As reg. 1 referred to is silent on whether an Order ought to be in writing or not, Senior State Counsel may well be right as far as an Order to a police officer to detain is concerned, but it must be backed and supported, by a *written* order which is served on the person in whose custody he is to be, as his authority to detain him. Without it, for example, a Prison Superintendent could not hold the detainee. It is in the nature of a committal warrant signed by a magistrate or judge. As the Detention Order is directed to the detainee’s custodian there would be no necessity to serve a copy on the detainee.

All that is necessary, as far as a detainee is concerned, is set out under art. 10 (2) of the Constitution:

“Any person who is arrested, detained or restricted shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest, detention or restriction.”

From the endorsement on the Detention Order, a copy of which was exhibited to Farooqi’s affidavit of 5 July, the Order was read out to all 78 detainees mentioned in the list attached to the Detention Order through interpreters. That seems sufficient compliance with art. 10 (2).

Under art. 21 (6) (a) of the Constitution it is ordained that:

“he shall, as soon as reasonably practicable, and in any case not more than two months after the commencement of his detention, be furnished with a statement in writing in a language that he understands specifying the grounds upon which he is detained;”

From that it is clear that a detainee can be kept for not more than two months

from the date of his detention without furnishing him with a statement in writing specifying the grounds on which he is kept.

I now turn to deal with the second and third points made by counsel for the applicants. Firstly that the list attached to the Detention Order ought to have been signed by the Vice President, and the persons particularised, so as to avoid mistakes. He mentioned in particular No. 21 on the list, Sulaiman Saku. He said there could be another of the same name, so it would be possible for the wrong man to be arrested and detained, unless more particulars were added. He also claimed that as the list was not signed by the Vice President any number could have been added on to the list later. That is quite true, and there is much force to his arguments, but there is no legal obligation to do so, and in this particular case it is a counsel of perfection, as counsel for the applicants does not challenge the fact that the people mentioned on the list were not the ones before the Court, or consisted of someone not a party to the application. It occurs to me that even if there were 178 names on the list, and not 78, he would not be concerned with the additional hundred.

In the absence of any rules as to the exact form of a Detention Order, and what it should contain, I must hold that the Order as it stands is not obnoxious and is valid, however much it could be improved upon, and I dismiss counsel's contentions.

Counsel concedes that one cannot look behind a *valid* Detention Order, as it must be assumed that a Minister ought to be, and is deeply concerned, about the liberty of the subject, and only issues a Detention Order after considering *all* the information before him. In coming to a conclusion he weighs *all* the evidence and acts (not merely on the advice of a police officer only). In particular he has the interests of the State in mind, and he is assumed to have acted judicially in arriving at the conclusion.

As the Detention Order cannot be assailed, the Writ cannot be made absolute and the Order Nisi is discharged.

Earlier in my Ruling, I said that I had been invited by both parties to give a ruling on the powers of the police, and in particular their duty to give details in their affidavits of the grounds and facts on which they held "reasonable suspicions" that the detainees were being subversive, or acting in breach of the public order, or were likely to. It was very tempting to submit to this invitation, but after much reflection, I considered that it would be wrong of me to do so, as the application before me was one of Habeas Corpus.

Having held that they are now properly detained under the Detention Order signed by the Vice President, any observations I would make on the legality or otherwise of the imprisonment of the applicants from 16 June 1969 to 4 July would be obiter, and could cause embarrassment to someone who may have to deal with possible litigation which may, or could, arise out of the circumstances leading up to this application at a later stage.

Perhaps, I may however make some observations on other matters, which are not unimportant ones in my view.

Firstly, Mr. Hassan said that he had received information early in June of activities then going on amongst *West Africans* and *Congolese*, as a result of which the 78 were arrested. It is difficult to understand on that averment, how it came about that the police arrested *Mauritians* and a *Belgian*, particularly the Belgian, as he was not in the country at the time the subversion was allegedly going on. It is also difficult to understand how Darbo was arrested.

Secondly, some 6 people were detained *in a police station* from the 16 June to 3 July 1969, when they were transferred to Luzira. Counsel for the applicants

said he knew that some were being held on *criminal charges*. That was not categorically denied by Mr. Hassan. In fact, from the Bar, Senior State Counsel said most of these people were in a racket – meaning engaged in criminal activities. The Emergency Regulations were designed to deal with public safety and good order and not crime as such. There is a very comprehensive code dealing with crime and dealing with procedure in criminal cases.

With respect, I therefore suggest that the cases of some, if not all, of these applicants, be reviewed by the appropriate Minister (as he can under the Emergency Powers (Detention) Regulations), as *on the face* of it (but I am making no ruling on this), the Emergency Powers Regulations may well have been misused by excess of zeal, perhaps on the part of the members of the C.I.D. in these cases.

Finally, Emergency Regulations deal with public safety and subversive activities, outside the purview of crime. There is a special branch of the police dealing with such matters, and I respectfully suggest that the Emergency Regulations are the peculiar province of the Special Branch. “Criminal Investigation Department” means what it says, that is, that it is concerned with *crime*, which in all conscience is a full time job. When the C.I.D. therefore arrogate to themselves, or are permitted to deal with, matters which are the proper concern of a special and separate branch, it is not surprising that suspicion is aroused, and Courts ring and abound with recriminations. I am not unmindful when I say this that the Emergency Regulations do speak of any police officer.

Order nisi discharged. No order as to costs.

For the applicants:

B. K. M. Kiwanuka and Y. Mugenyi (instructed by *Kiwanuka and Co.*, Kampala) and *Z. Haque* (instructed by *Haque and Gopal*, Kampala)

For the respondent:

M. B. Matovu (Senior State Attorney) and *J. M. Akankwasa* (instructed by the *Attorney General, Uganda*)

Uganda v Baguma [1970] 1 EA 169 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	13 September 1969
Case Number:	371/1969 (138/69)
Before:	Dickson J
Sourced by:	LawAfrica

[1] *Criminal Practice and Procedure – Revision – Sentence – Suspended sentence – Petition by prosecution to High Court to reverse order of suspension made by magistrate – Procedure by petition*

rather than appeal correct – High Court has same powers on petition as on appeal – Criminal Procedure Code (Cap. 107), ss. 298 A, 325, 331 (3) and (4) and 341 (1) (a) and (5); Magistrates Courts Act, s. 30 (U.).

[2] Criminal Practice and Procedure – Sentence – Suspended sentence – Principles – Not appropriate where offences serious, persistent and involved a breach of trust and a large sum – General observations – Criminal Procedure Code (Cap. 107), ss. 298 A and 299 A (U.).

Editor's Summary

The respondent, a 23-year-old bank supervisor, was convicted as a first offender on his own plea of six counts of theft by a servant relating to dishonest transactions in the course of his duties, spread over a period of some nine months and involving a total sum stolen of Shs. 25,000/-. He asked for further thefts of a total of Shs. 3,500/- to be taken into consideration. None of the money had been recovered. He was sentenced to concurrent periods of imprisonment,

the longest being three years, but the magistrate suspended the sentences under s. 298 A of the Criminal Procedure Code. The Director of Public Prosecutions brought this petition for revision to the High Court under s. 341 of the Code, asking for this suspension order to be reversed and for the sentences to be carried into effect; and counsel for the State asked at the hearing for a ruling clarifying whether an appeal or a petition for revision is the right procedure in such cases. It was argued for the respondent that the correct procedure was by way of appeal.

Held –

- (a) (i) s. 331 of the Criminal Procedure Code confers no right of appeal;
- (ii) s. 341 of the Code gives the Director of Public Prosecutions the right to file a petition for revision in cases such as the present, and the petition was proper (*Hitila v. Uganda* (6) followed);
- (iii) the High Court can deal with such a petition as if it were an appeal, and has the same powers.
- (b) because of the serious and persistent offences, the breach of trust and the sum involved it was a miscarriage of justice to have suspended the sentences.

Observations upon suspension of sentences generally.

Order for suspension of sentence reversed.

Cases referred to in judgment:

- (1) *Stephens v. Cuckfield R.D.C.*, [1960] 2 All E.R. 716.
- (2) *R. v. Bazeley*, [1969] Crim. L.R. 207.
- (3) *R. v. Graham*, [1968] Crim. L.R. 627.
- (4) *R. v. Hall*, [1968] Crim. L.R. 688.
- (5) *R. v. O'Keefe*, [1969] 1 All E.R. 426.
- (6) *Hitila v. Uganda*, [1969] E.A. 219.

Judgment

Dickson J: The accused appeared before a Magistrate Grade I, at Fort Portal, charged on a charge sheet containing six counts of theft by a servant, contrary to ss. 252 and 258 of the Penal Code. He was convicted on his own pleas of the offences charged and, he asked for a further six counts to be taken into consideration. He was sentenced respectively as follows on each count: 3 years, 1 year, 15 months, 1 year, 18 months and 6 months. The sentences were ordered to run concurrently, and suspended under the provisions of s. 298A of the Criminal Procedure Code.

The Director of Public Prosecutions petitions this court for an order of revision under s. 341 of the Criminal Procedure Code.

The relevant portion of the Petition asks for an order:

“Reversing the suspension order of the learned trial Magistrate made under s. 298A (1) of the Criminal Procedure Code following conviction by him on five (*sic*) counts of Theft by Servant contrary to sections 252

and 258 of the Penal Code on the ground that, bearing in mind the nature of the offence and the character of the offender, the making of such a suspension order is an error involving a miscarriage of justice;

Directing under Section 331 (4) of the Criminal Procedure Code that the sentence to which such order relates be carried into effect; and

Ordering under Section 179 of the Criminal Procedure Code that the

money which the accused had admitted stealing shall be restored to the owner.”

At the commencement of his submissions Senior State Attorney states that apart from the main issue of seeking a reversal of the order of suspension, the Director of Public Prosecutions wishes this court to clarify the procedure to be adopted in cases like the instant. That is to say, whether the Director of Public Prosecutions must approach this court by way of an appeal rather than by a petition for revision.

Senior State Attorney argues that s. 331 (4) of the Criminal Procedure Code (as amended by Act 23 of 1969) speaks in terms of “An appellate court may, on any appeal . . .”, and therefore on the face of it, would suggest that for any appellate court to deal with an order under s. 298A of the Criminal Procedure Code, it could only be done by following the procedure relating to appeals. He however contends that where the Director of Public Prosecutions is the party who desires to challenge an order made by a magistrate under s. 298A of the Criminal Procedure Code, he would encounter a number of problems in view of the decision of the East Africa Court of Appeal in *Hitila v. Uganda*, [1969] E.A. 219. In that case, it was held that the Director of Public Prosecutions had no right of appeal to the High Court other than that given by s. 325 of the Criminal Procedure Code (which confers a right of appeal against acquittal on the ground that it is erroneous in law), and no right of appeal was given to the Director of Public Prosecutions under s. 30 of the Magistrates’ Courts Act (Cap. 36). It was therefore further held that the Director of Public Prosecutions had been entitled to bring his petition for revision under s. 341 (1) (a) of the Criminal Procedure Code.

I am invited by the State to consider this case under s. 341 (1) (a) of the Criminal Procedure Code and treat the revision as if it were an appeal under s. 331 (4) of the Criminal Procedure Code, albeit a petition for revision.

Counsel for the respondent argues that the petition is improperly before this Court. He submits that ss. 298A and 331 (4) of the Criminal Procedure Code are recent amendments to the Criminal Procedure Code with effect from 2 May 1969. He contends that Parliament envisaged that persons might be aggrieved in the day to day implementation of s. 298A of the Criminal Procedure Code, and accordingly in its wisdom made provision in s. 331 (4). He however agrees that the Director of Public Prosecutions has no right of appeal under s. 30 of the Magistrates’ Courts Act, and contends that the case of *Hitila v. Uganda* (supra) dealt with matters which had already been provided for, of which the subject of suspended sentence was not one. He submits the only way the Director of Public Prosecutions is able to challenge the order of the magistrate is by way of appeal.

It is convenient at this stage to set out the provisions of ss. 298A (1) and 331 (3) and (4) of the Criminal Procedure Code. Section 298A (1) reads:

“Suspended sentence.	(1) Notwithstanding the provisions of section 298 of this Code, where any offender has been sentenced by a court to which this section applies, to imprisonment for a period not exceeding three years, the court may, after taking into consideration the nature of the offence, the age and character of the offender and any other mitigating circumstances, order that the sentence be suspended.”
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Section 331 (3) and (4) provides:

“(3) An appellate court may, on any appeal, if it considers that any sentence of imprisonment ought to have been suspended in accordance with

the provisions of section 298A of this Code, order that such sentence be suspended and the provisions of that section shall apply mutatis mutandis as if such order had been made at the time such sentence was imposed.

- (4) An appellate court may, on any appeal, if it considers a suspension order ought not to have been made under the provisions of section 298A of this Code, direct that the sentence to which such order relates be carried into effect and any such sentence shall be deemed to commence from the date upon which the appellant was received into prison pursuant to the direction of the appellate court.”;

There is no inherent right of appeal. A right of appeal is a creation of statute, and before it can be exercised it must be expressly given. Does s. 331 (4) give to the Director of Public Prosecutions a right of appeal in the matter of suspended sentences?

Section 331 (4) appears in Part X of the Criminal Procedure Code under the heading:

“Part X – Appeals

Appeals from Courts”

As has already been pointed out, s. 325 gives a right of appeal to the Director of Public Prosecutions only in case of an acquittal, limited to a decision erroneous in law. The only place a right of appeal is conferred on an accused in this Part, is under the sub-head “Appeals from High Court” and is contained in s. 345, which gives to an accused a right of appeal to the Court of Appeal from a conviction in the High Court or by a Magistrate’s Court under s. 216A (where an accused has been convicted and committed to the High Court sentence). Sections 324 to 338 inclusive which fall under the sub-head “Appeals from Courts”, deal mainly with procedural matters prior to the hearing of an appeal and the hearing of the appeal itself. The right of appeal from magistrate’s courts to the High Court (“appellate court”) as we have already seen is expressly given by s. 30 of the Magistrates’ Courts Act (Cap. 36) and does not apply to the Director of Public Prosecutions. This is conceded by counsel for the respondent. Section 331 (2) specifies what the High Court may do with any appeal (for example reverse the finding and sentence and so on). Prior to the passing of the Criminal Procedure Code (Amendment) Act 1969 (Act 23 of 1969), there were no sub-ss. (3) and (4) of s. 331; and no-one would have seriously argued that s. 331 of Criminal Procedure Code before the passing of Act 23 of 1969, conferred a right of appeal on any person.

What the legislation did, as a result of the passing of Act 23 of 1969, was to include in the powers of the High Court, in its appellate jurisdiction, provisions as regards suspended sentence which are a new creation. In my opinion sub-ss. (3) and (4) are in pari materia with the provisions contained in sub-s. (2). Sub-section (2) does not give a right of appeal to anyone, let alone the Director of Public Prosecutions. I fail to comprehend how sub-ss. (3) and (4) by any construction, confer a right of appeal on the Director of Public Prosecutions and for that matter an accused.

Marginal notes are not considered by Parliament at any stage of the proceedings of a Bill and on that ground, the weight of authority is against their use as an aid to construction. The authorities are not, however unanimous and the principle does not apply to a note which, because it is referred to in the body of statute can be said to have received the authority of parliament: 36 Halsbury (3rd Edn.), p. 373. In *Stephens v. Cuckfield R.D.C.*, [1960] 2 All E.R. 716, at p. 720 it was said by Upjohn, L.J., that while the marginal note to a section cannot control the language used in the section, it is at least permissible to approach a consideration of its general purpose and the mischief at which it is arrived, with the note in mind. The marginal note to section 331 reads:

“Powers of appellate court on appeals from convictions.”

The language of s. 331 of the Criminal Procedure Code (as amended) is palpably clear, and in no uncertain terms it defines the powers of the appellate court and, not by any stretch of imagination can it be said to confer a right of appeal on anyone.

In my view on the authority of *Hitila v. Uganda* (supra) the Director of Public Prosecutions has the right to file a petition for revision in the instant case under s. 341. It is of interest to observe the provisions of sub-s. (5) of s. 341 which reads:

“Any person aggrieved by any finding, sentence or order made or imposed by a magistrate’s court may petition the High Court to exercise its powers of revision under the provision of this section:

Provided that no such petition shall be entertained where the petitioner could have appealed against any such finding, sentence or order and has not appealed.”

It cannot be said that the Director of Public Prosecutions is not a “person aggrieved” within the meaning of the sub-section; and as he has no right of appeal his remedy is by way of petition for revision. It is manifestly clear from the provisions of s. 341 (1) (a) that in the case of a conviction, the High Court may exercise any of the powers conferred on it as a court of appeal by ss. 331 and 334 of the Code, and enhance the sentence. In other words, albeit a petition for revision, this court is endowed with powers to deal with the petition as if it were an appeal, and therefore the powers bestowed by s. 331 (3) and (4) of the Criminal Procedure Code (as amended by Act 23 of 1969) in the case of an appeal applies equally in the event of a petition for revision.

Section 341 (8) reads:

“Where an application is made by the Director of Public Prosecutions under the provisions of sub-section (1) of this section to make an order to the prejudice of an accused person, such application shall be lodged with the registrar within thirty days of the imposition of such sentence unless, for good cause shown, the High Court extends the time.”

The accused in this case was sentenced on 8 May 1969 and the petition was lodged with the Registrar on 4 June. It follows therefore, that the application was lodged within the time prescribed.

Contrary to what Mr. Kakoza submits, this Court is properly seised with this application.

I now turn to consider whether the order of suspension of 3 years’ imprisonment under s. 298A involves a miscarriage of justice. By the provisions of s. 298A (1), since 2 May of this year certain courts are empowered to suspend for a period of two years, any sentence of imprisonment of not more than three years in length. These provisions are in outline the same as those contained in s. 39 of the English Criminal Justice Act 1967. In passing, it be mentioned as a matter of interest, that this system existed in Zambia long before it was introduced in England.

The accused is a first offender 23 years old, and he held the responsible post of supervisor in Barclays Bank D.C.O., Fort Portal. For him to have held that position at the age of 23 years his promotion must have been rapid. It is apparent from the charge sheet, that these dishonest transactions had spread over between July 1968 and March 1969, covering a period of some nine months. In so far as I am able to gather from the somewhat brief facts, the accused would in the course of his duties receive monies on behalf of his employers, from

depositors who held savings accounts. It would seem that the Savings sections of the bank was his responsibility. He made false entries in the saving bank books and ledger cards and thereby stole. He also employed the same modus operandi as regards monies passing between his bank and other banks in the town and accordingly stole. The aggregate sum stolen as charged in the six substantive counts is Shs. 25,000/-, and this Court understands during argument by counsel that offences taken into consideration reflect a further sum of Shs. 3,500/-.

Was the learned magistrate correct in suspending the sentences under s. 298A? The State contends that having regard to the nature of the offence in each count and the surrounding circumstances, the order is an error involving a miscarriage of justice. By way of preface, I wish to advise magistrates that the exercise of this discretion should not be done willy-nilly – it should be exercised judicially and a sentence ought not to be suspended as an easy way out. A correct approach is to be found in the case of *R. v. O'Keefe*, [1969] 1 All E.R. 426. The question of suspension does not even arise until the Court has decided against all non-custodial treatment and has decided upon imprisonment. The suspended sentence is, in effect, the last chance before a non-suspended prison sentence. The suspended sentence is not to be used when probation is clearly indicated. *Ex hypothesi* no supervision is required, because that is why probation was rejected. See the New Law Journal, 29 May 1969, p. 502, at p. 503.

In *R. v. O'Keefe*, the accused had an immature aggressive psychopathic personality, was subject to uncontrollable rages, drank to excess and took drugs. The doctors eventually reported that their ability to help him was problematical and that further investigation should be made. The Court of Appeal decided against a probation order with a condition of mental treatment, and upheld a sentence of 18 months' imprisonment, not suspended. He was a man 25 years of age. It must be pointed out that he had a lamentable record.

It was held in that case that, before passing a suspended sentence, the court must go through the process of eliminating other possible courses and only when, having considered the alternatives, it decides that the case in question is one of imprisonment, should the option of a suspended sentence be considered; in particular, a suspended sentence should not be given when a probation order was the proper order to make. At pp. 427 and 428 Lord Parker, C.J., said:

“This court has found many instances where suspended sentences are being given as what one might call a ‘soft option’, when the court is not certain what to do, and in particular they have come across many cases when suspended sentences have been given when the proper order was a probation order.

This court would like to say as emphatically as they can that suspended sentences should not be given when, but for the power to give a suspended sentence, a probation order was the proper order to make. After all, a suspended sentence is a sentence of imprisonment. Further, whether the sentence comes into effect or not, it ranks as a conviction, unlike the case where a probation order is made, or a conditional discharge is given. Therefore, it seems to the court that before one gets to a suspended sentence at all, the court must go through the process of eliminating other possible courses such as absolute discharge, conditional discharge, probation order, fines, and then say to itself: this is a case for imprisonment, and the final question, it being a case for imprisonment, is immediate imprisonment required, or can I give a suspended sentence?”

No doubt, I have dealt with this phase somewhat at length, for in my view, it is most important that magistrates be guided how best they can deal with this

matter. After all, the suspended sentence is a recent innovation in the system of our criminal law, and we can certainly profit from the judicial decisions and pronouncements of the courts of other jurisdictions, where suspended sentences have been a part of their criminal law before now.

In the instant case, as has been pointed out, the accused is a first offender. On the other hand, he is convicted not of simple offences, but of offences against the Penal Code, which can be properly assessed as grave. The legislature regards the offence stealing by servants with a degree of seriousness, for a maximum penalty of seven years' imprisonment is prescribed. The circumstances of this case are aggravated and obviously so. It was not just an isolated act; but they were acts perpetrated over a period of about nine months. They were deliberate and calculated and therefore cannot be said that the accused yielded to a single sudden temptation. The aggregate amount involved in the substantive counts is not insignificant. It amounts as indicated to Shs. 25,000/-.

It may be argued that the accused being a first offender over 18 years of age, by virtue of s. 299A of the Criminal Procedure Code (as amended by Act 23 of 1969), "A Magistrate's court shall not pass a sentence of imprisonment", unless the Court is of the opinion that having regard to all the circumstances (including the character of the offender and the gravity of the offence), no other method of dealing with him is appropriate. Counsel for the respondent submits that the learned magistrate exercising his discretion under ss. 298A and 299A was justified in passing suspended sentences on the accused.

We have seen that in *R. v. O'Keefe* the Court of Appeal said that the suspended sentence is a sentence of imprisonment. If that is so, all other things being equal, and favourable to the accused as set out in section 299A, it would not have been correct for that Magistrate to have imposed a suspended sentence of 3 years in all, for he was in effect passing a sentence of imprisonment, albeit not to take effect immediately. Be that as it may, even if the accused's character was hitherto unsullied. "character" is not the only criterion in sections 298A or 299A and for that matter gravity.

Principal State Attorney suggests that "character" in ss. 298A and 299A means something more than past record – it is not enough for an accused to be a first offender and past behaviour ought to be considered. In the instant case he points out the accused takes monies from his employers over a period of time – that he says is "character" – a bad one. I would be inclined to think that a person can be of a bad character, albeit a first offender. In so far as the record is concerned, the accused was, up to the commission of the offences, of good character. But of course a magistrate in exercising his discretion under s. 298A would be right in taking into consideration the persistency in committing this type of offence over a period of time, in contra-distinction to an isolated offence.

Where there is persistency in perpetrating calculated and deliberate fraud or breach of trust, as is the case here, the ameliorative provision of s. 299A can hardly be of any avail. The circumstances are such that imprisonment is indicated. Once the magistrate has decided on imprisonment, he must address his mind as to whether it should take effect immediately.

In the New Law Journal (*supra*) at p. 504 under the caption "The Suspended Sentence Assessed" the writer says that the most likely candidate of all to receive a suspended sentence appears to be the adult offender of previous good character, not requiring supervision, who has committed an isolated or uncharacteristic offence, which would otherwise normally attract custodial imprisonment and which by reason of its seriousness could not be properly marked by a fine or conditional discharge.

Factors indicating that suspension would not be appropriate include the

really serious, calculated and persistent fraud or breach of trust. In the instant case, as has already been shown, the offence of theft by servant is a serious one; it was a calculated and persistent fraud or breach of trust. The accused held a position of trust, and if his employers had not trusted him he would not have occupied that position of responsibility. He betrayed the trust which had been reposed in him. This is not a case where there is a mitigating factor of restitution as sometimes happens. In *R. v. Bazeley*, [1969] Crim. L.R. 207 a postman aged 45 pleaded guilty to three counts of stealing postal packets and asked for 54 other cases to be taken into account. The offences were committed over a period of two years. He said he had started stealing because of financial difficulties and then could not stop. There was some evidence that he had suffered from depression. He was sentenced to two years' imprisonment. He had no previous convictions. It was submitted that a suspended sentence would be appropriate. In that case, the Court of Appeal said, it was tragic when a public servant lost his good character, job and pension because of criminal stupidity, but it has always been recognised that that is no ground for not imposing a severe sentence. The Court went on to say that the sentence was lenient and there was no question of suspending it. In *R. v. Graham*, [1968] Crim. L.R. 627, a man aged 41 pleaded guilty to one charge of obtaining goods by a forged cheque and six of obtaining goods by false pretences. The offences were committed in two groups. He obtained goods worth over £2,000 by worthless cheques. He was sentenced to 2 years' imprisonment. He had previous convictions, the last being in 1957. He said he had committed the offences because of matrimonial troubles, and debts and asked for the sentence to be suspended. The Court of Appeal said that there were two serious deliberate swindles, and there was a great deal to be said for not suspending the sentence in such a case. The sentence was not wrong in principle. *R. v. Hall*, [1968] Crim. L.R. 688 is yet another case of persistent fraud where the Court of Appeal refused to suspend a sentence of thirty months.

It is observed that in this case the accused gave no reason at all for these calculated and persistent thefts.

This was not a case for probation. It was stated the accused came from a stable family. It was also said his brother is an Assistant District Commissioner, Bunyoro. Equally, by reason of the seriousness of the case, a fine would be inappropriate.

In my judgment, because of the serious and persistent offences, the breach of trust and the sum involved it was a miscarriage of justice to have suspended the sentence. The sentence was not wrong in principle. The sentences which are concurrent will take immediate effect on the execution of the warrant of commitment. The accused will therefore serve 3 years' imprisonment in all.

The Director of Public Prosecutions abandoned his application contained in the petition for an order of restitution under s. 179 of the Criminal Procedure Code, as no property whatsoever had been recovered from the accused and accordingly there was nothing to be restored.

This Court observed that the magistrate had ordered that any money owing to the accused by his employers, Barclays Bank, not exceeding Shs. 25,000/- should be paid to the Bank itself under s. 174 (1) of the Criminal Procedure Code. I would have thought that if the magistrate was minded to exercise his powers under this provision, he would have ascertained how much money in fact, if any, was due to the accused from the bank. Be that as it may, in any event, he was not entitled in view of the proviso to sub-s. (1) to order an amount exceeding Shs. 1,000/- as compensation. His order is therefore vague. There is no alternative but to set aside the order for the payment of compensation under s. 174 (1) of the Criminal Procedure Code, and leave the bank to pursue its

civil remedy if it so desires. The order of the magistrate under s. 174 (1) is accordingly set aside.

Before leaving this judgment, I would like to bring to the attention of magistrates that under s. 298A (9), save where the context otherwise requires, only the High Court, a Court presided over by a Chief Magistrate or a Magistrate Grade I, and such other courts as may be specified by the Minister, are empowered to make an order of suspension under s. 298A (1). It is observed that some Magistrates Grade II are making such orders. The Minister has not specified any Court presided over by a Magistrate Grade II to make orders of suspension under s. 298A, and the practice must cease.

Sentence varied.

For the petitioner:

F. M. Ssekandi (Principal State Attorney, instructed by the Director of Public Prosecutions)

For the respondent:

C. M. B. Kakoza (instructed by *Mayindo & Co.*, Fort Portal)

Manyara Estates Ltd & others v National Development Credit Agency [1970] 1 EA 177 (CAD)

Division:	Court of Appeal at Dar-es-Salaam
Date of judgment:	13 October 1969
Case Number:	27/1969 (146/69)
Before:	Sir Charles Newbold P, Duffus VP and Law JA
Sourced by:	LawAfrica
Appeal from:	The High Court of Tanzania – Biron, J.

[1] *Civil Practice and Procedure – Execution – Payment out of court – Several creditors – Correct procedure – Whether procedure will be interfered with when all proper parties before the court – Civil Procedure Rules, O. 21, rr. 1 and 57 (T).*

[2] *Land – Right of occupancy – Revocation – Payment for unexhausted improvements – Whether a mortgagee of the right of occupancy is entitled to a charge over payment made for unexhausted improvement – Land Registration Ordinance (Cap. 334), s. 57 (T).*

[3] *Land – Right of occupancy – Revocation – Payment for unexhausted improvements – Whether charge created by mortgage of right attaches to compensation for unexhausted improvement – Whether doctrines of tracing or conversion apply to the monies received as compensation.*

[4] *Land – Right of occupancy – Compensation for unexhausted improvements – Whether mortgagee is entitled to a charge over this compensation – Land Registration Ordinance (Cap. 334), s. 57 (T).*

[5] Land – Right of occupancy – Whether charge created by mortgage of right attaches to money receivable as compensation for unexhausted improvements – Whether doctrines of tracing or conversion apply to the monies received as compensation.

Editor's Summary

A right of occupancy of land in Tanzania was granted to a Mr. Coulter by virtue of the Land Ordinance (Cap. 113) (T) and in 1955 Mr. Coulter mortgaged his right to secure two loans from the Land Bank of Tanganyika. In 1964, the right of occupancy was revoked and an amount of Shs. 123,940/- became payable as compensation for unexhausted improvements on the land in terms of s. 14 (b), Land Ordinance. The respondents are the successors in title to the Land Bank of Tanganyika and are entitled to the benefit of the mortgage.

Mr. Coulter made default in his payment of the mortgage debt and after the right of occupancy had been revoked, the respondent brought an action to recover the balance due and judgment was entered in its favour for the amount of compensation payable for unexhausted improvements. The four appellants are commercial companies who also obtained judgments against Mr. Coulter and the point at issue was to determine the rights of the creditors to this amount of compensation and whether the respondent had preferential rights by reason of its mortgage. The application was originally filed ex parte under O. 21, r. 1, but was afterwards served on the other parties.

Held –

- (i) (by the Court) the procedural irregularity was formal, caused no prejudice, and the judge was correct to ignore it;
- (ii) (by the Court) the equitable doctrine of tracing assets does not apply in such circumstances;
- (iii) (by Sir Charles Newbold, P., and Law, J. A.; Duffus, V.-P. not deciding) the charge created by the mortgage did not attach to the compensation into which the right of occupancy had been converted;
- (iv) (by Sir Charles Newbold, P. and Law, J.A.; Duffus, V.-P., dissenting) the mortgagee was not in the position of the occupier, and was therefore not entitled to receive the compensation.

Observations on the application of English equitable principles in Tanganyika.

Appeal allowed. Cross appeal dismissed.

Cases referred to in judgment:

- (1) *Doe v. Pott* (1781), 2 Dougl. 709, 99 E.R. 452.
- (2) *Lees v. Whiteley* (1866), L. R. 2 Ew. 143.
- (3) *Webster v. Power* (1868), L.R. 2 P.C. 69.
- (4) *Pile v. Pile, ex parte Lambton* (1876), 3 Ch. D. 36.
- (5) *Cooper v. Metropolitan Board of Works* (1883), 25 Ch. D. 472.
- (6) *The Law Guarantee Trust Society v. Mitcham*, [1906] 2 Ch. 98.
- (7) *Sinnot v. Bowden*, [1912] 2 Ch. 414.
- (8) *Sinclair v. Brougham*, [1914] A.C. 398.
- (9) *Earl of Radnor v. Folkestone Lift Co.*, [1950] 2 All E.R. 690.
- (10) *Premchand Nathu & Co. v. Land Officer*, [1962] E.A. 738.
- (11) *Barclays Bank Ltd. v. Quistclose Investments Ltd.*, [1968] 3 All E.R. 651.

The following considered judgments were read:

Judgment

Law JA: The facts leading up to the appeal in this unusual and difficult case are as follows:

The four appellants are limited liability companies, and are creditors of Mr. H. M. Coulter, formerly a farmer who held a right of occupancy over land near Arusha. In 1960 the Land Bank advanced two sums of money, Shs. 96,000/-and Shs. 30,000/-, to Mr. Coulter by way of loans subject to interest and repayable by instalments on specified dates. These loans were secured by mortgages on the land held under the right of occupancy. The respondent (hereinafter referred to as “the Agency”) is the successor to the Land Bank. On 24 June 1965, Mr. Coulter being in default, the Agency recovered judgment

against him for the balance of the loans and interest then outstanding in the sum of Shs. 148,560/- plus further interest and costs. The Agency levied execution against Mr. Coulter's movable property and recovered partial satisfaction to the extent of Shs. 29,335/-. The four appellants had also obtained judgments totalling about Shs. 100,000/- against Mr. Coulter.

In October 1964, Mr. Coulter's right of occupancy was revoked by the President. He thereupon became entitled to compensation for unexhausted improvements upon the land. This compensation, by s. 14 (2) of the Land Ordinance (Cap. 113), is payable by the new occupier to the President "on behalf of the previous occupier" and has been assessed at £8,166. Compensation is normally levied from the new occupier by way of premium by the Commissioner of Lands on behalf of the President. There is no evidence whether a new occupier for the land has come forward, and it seems unlikely that one could be found who would pay such a premium in respect of unexhausted improvements. This being so, as an act of policy the Treasury in November 1965 lent to the Agency the sum of £120,020 to provide for the payment of compensation for unexhausted improvements in respect of all revoked agricultural rights of occupancy, including Mr. Coulter's. This sum was to be paid by the Agency on behalf of actual or potential new occupiers to the Commissioner of Lands, who in turn was to pay it to the former occupier, subject to deduction of debts owing by the former occupier to the Agency and to the Tanganyika Farmers' Association. In Mr. Coulter's case, his debts to these bodies exceeded the amount of compensation to which he was entitled. The Agency duly paid an amount corresponding to Mr. Coulter's assessed compensation to the Commissioner of Lands, and the Commissioner paid the debt of £1,686 owing to the Tanganyika Farmers' Association, but before the Commissioner paid the debt owing to the Agency he was served with prohibitory orders at the instance of all four appellants, preventing him from paying out the Agency's debt in preference to other creditors. The Agency then applied, on 4 May 1967, for a garnishee order prohibiting the Commissioner from making any payment out of moneys in his hand due to Mr. Coulter and asking that these moneys be paid into court. The Commissioner in pursuance of an order by the court duly paid the Shs. 129,607/-, being the balance of the sum which he had received from the Agency, into court. The Agency then applied to the court under O. 21, r. 1 of the Civil Procedure Rules for payment of Shs. 123,940/- of that sum to itself in satisfaction of the balance of its decree against Mr. Coulter. This application was originally made ex parte, but the court being aware of the existence of other decrees against Mr. Coulter, ordered that the application be served on the other judgment creditors, who are the four appellants. In course of time the matter came before Biron, J., all the creditors being represented. Mr. Peera who then appeared for the parties who are now the appellants, objected to the procedure adopted by the Agency. He submitted that the Agency, being one of five creditors under money decrees, should not have applied under O. 21, r. 1 for payment to itself of the whole of the moneys deposited in court by the Commissioner, but should have applied under O. 21, r. 57, which provides for the investigation of claims to, and objections to, the attachment of attached property. That may well be so, but even if the procedure adopted was defective, it achieved the object envisaged by r. 57 of bringing all the interested parties before the court for their conflicting claims to be adjudicated upon. As the judge said, when this objection was taken before him:

"As all the parties concerned are represented here, I consider that the matter should now be disposed of . . .".

This matter was the subject of the first ground of appeal, argued before us by Mr. N. P. Patel and Mr. N. M. Patel. We indicated that we saw no merit in

this ground and did not require argument on it from Mr. Kanji for the respondent. I would only say that I entirely agree with the action taken by the judge. The procedural irregularity, it was conceded by Mr. N. M. Patel, was formal and could have been cured by a simple amendment. It has not caused any prejudice; on the contrary the judge's decision to proceed with the hearing has saved the parties time and expense.

At the hearing Mr. Kanji submitted that the Agency was entitled to have its judgment debt satisfied in full with priority over the four other judgment creditors, for the following reasons:

1. That the Agency was entitled to recover the balance of its judgment debt, that is to say Shs. 123,940/-, from the Commissioner of Lands by virtue of the terms and conditions under which the money was made available by the Treasury to compensate former holders of rights of occupancy in respect of the value of unexhausted improvements on their revoked rights of occupancy.
2. That the Agency, by reason of its mortgages, had stepped into the shoes of Mr. Coulter and was entitled to receive from the President, or his representative the Commissioner, so much of the compensation as would satisfy its judgment debt by virtue of the security provided by the mortgages.
3. That, if the moneys in the hands of the Commissioner represented moneys impressed with a trust in favour of Mr. Coulter, the Agency by virtue of its mortgages was entitled to recoup its judgment debt from these moneys, on the application of the equitable doctrine of conversion, defined in Snell's Principles of Equity (24th Edn.) at p. 234 as follows:

“The effect of conversion is to turn realty into personalty, or personalty into realty.”

Mr. Kanji's argument in this respect was that Mr. Coulter's land, which was mortgaged to the Agency, had been converted into the compensation payable to Mr. Coulter upon the revocation of Mr. Coulter's right of occupancy. Mr. Kanji submitted that the security in relation to the land having been destroyed by the Presidential act of revoking the right of occupancy without the Agency's assent, the Agency as mortgagee has the right to indemnify itself from the compensation payable on that revocation, in accordance with the principle enunciated in Fisher's Law of Mortgage (7th Edn.) at p. 683 as follows:

“The right of the owner of property generally, and therefore of one who has a pledge or other security thereon, is not destroyed by the mere transmutation of its subject matter into a different form without his assent.”

The third of these submissions found favour with the judge, who decided that by virtue of the mortgages held by the Agency of Mr. Coulter's land, on the application of the doctrine of conversion, the Agency's security on the land had been converted into the compensation paid on the revocation of the right of occupancy. The learned judge came to no conclusion on the second submission, but rejected the first submission, holding that as Mr. Coulter was not a party to the arrangement whereby the Treasury agreed to provide funds to compensate the former owners of revoked rights of occupancy, the preference of the Agency's debt over the debts owing to other judgment creditors could not be supported. The respondent has cross-appealed on this point in the following terms:

“The learned judge ought to have held that the respondent was entitled to be paid out the moneys on the basis of the 'special' agreement entered

into between the Ministry of Finance, the Ministry of Lands, Settlement and Water Development, and the respondent.”

In considering this matter, I will refer to the Ministry of Lands, Settlement and Water Development as “the Commissioner”, and the respondent as “the Agency”. The terms of the agreement were set out in a letter from the Treasury dated 24 November 1965, the relevant parts of which read as follows:

“I am directed to . . . inform you that the Minister of Finance has now agreed that a loan of £120,000 should be made to your Agency on revised terms. The loan will be made for the specific purpose of enabling your Agency to make loans to the new occupiers of agricultural land over which the former rights of occupancy have been revoked so that they may pay for the unexhausted improvements.

2. The revised terms of the loan . . . are as follows:

- (a) . . .
- (b) the loan shall be used solely for the purpose of paying, on behalf of the actual or potential new occupiers, the unexhausted improvements premia in respect of the now revoked agricultural rights of occupancy as listed in the Schedule attached. The total value of these premia is £120,000 and the Agency, on receipt of the loan, shall forthwith pay this sum to the Commissioner . . . to meet the cost thereof.
- (c) The Commissioner . . . on receipt of the sum of £120,020 shall pay out to the former occupiers the sums as listed in column 2 of the Schedule, after deducting the debts owed to the Agency and the Tanganyika Farmers’ Association, provided that where the debts of the former occupier exceed the total compensation due to him, the payments to the Agency and the T.F.A. shall be in proportions as set out in columns 8 and 9 of the Schedule.”

The Schedule shows the valuation of compensation in Mr. Coulter’s case as £8,166, his debts to the Agency and the T.F.A. as £9,088, and the “balance compensation payable to farmer” as nil.

It should be noted that this loan made by the Treasury in respect of compensation due to former owners was entirely voluntary and not as the result of any legal obligation to provide funds for paying compensation. The intention of the Treasury was clear: it was not primarily to benefit the former occupier but to enable the new occupier to pay, as a condition on the grant of a right of occupancy, a premium representing the former occupier’s right to compensation for unexhausted improvements. The Treasury was only prepared to provide these funds on condition that the debts owing to the Agency and the T.F.A. were first settled, and the intention was that the former occupier should only benefit to the extent of the excess if any of his compensation entitlement over his debts, which in Mr. Coulter’s case was nil. The question is whether, under the arrangement agreed to by the Treasury, these intentions could be carried into effect, or whether the full amount representing compensation, when received by the Commissioner, became money impressed with a trust in Mr. Coulter’s favour and thus attachable at the instance of Mr. Coulter’s judgment creditors at large.

It cannot be over-stressed that the funds made available in this case were provided voluntarily by the Treasury, with the intention that the rights of the Agency as mortgagee be preserved. The money was not paid under any contractual or statutory obligation, and this is enough to distinguish the instant case from such cases as *Sinclair v. Brougham*, [1914] A.C. 398 and *Earl of*

Radnor v. Folkestone Lift Co., [1950] 2 All E.R. 690. A not dissimilar situation was considered recently by the House of Lords in England in the case of *Barclays Bank Ltd. v. Quistclose Investments Ltd.*, [1968] 3 All E.R. 651. A company decided to pay a dividend to its shareholders, but as it lacked liquid funds it borrowed the sum necessary to pay the dividend from Quistclose Ltd. who lent the money on the express condition that it would only be used to pay the dividend due. Before the dividend was actually paid to the shareholders the company went into voluntary liquidation. Quistclose Ltd. claimed the return of the loan, but the liquidator sought to consolidate it with the company's general assets in the liquidation. It was held that as between Quistclose Ltd. and the company, the terms on which the loan were made were such as to impress on the money a trust in Quistclose Ltd.'s favour in the event of the dividend not being paid, and as the dividend was not in fact paid, the primary object for which the loan was made had failed and Quistclose Ltd. was entitled to the return of the money which it had lent. It cannot be doubted that if the dividend had been paid to the shareholders, the primary trust upon which the money had been lent would have been carried out, and the lender's remedy against the company would have been only in debt, no secondary trust then arising in the lender's favour. Similarly in the case now under consideration, the Treasury advanced the compensation money to the Agency impressed, in my view, with a trust in its favour which remained effective until the object of the loan had been carried out. That object was to provide loans to the new occupiers of revoked rights of occupancy to enable them to discharge their statutory obligation of paying compensation for unexhausted improvements. When the Agency paid the amount of the loan to the Commissioner, this was in effect a payment on behalf of new occupiers to which the former occupier had a statutory right, under s. 14 (2) of the Land Ordinance. This stage having been reached, the Treasury had no power to lay down conditions as to how the former occupier should apply the money to which he was legally entitled, and any trust in favour of the Treasury in relation to that money ceased to exist. For these reasons, I am of opinion that when the sum representing Mr. Coulter's entitlement to compensation reached the hands of the Commissioner, it became money paid "on behalf of the previous occupier", that is to say Mr. Coulter. It ceased to be impressed with any trust in favour of the Treasury, and was attachable by Mr. Coulter's judgment creditors. I would therefore dismiss the cross-appeal.

As regards the appeal itself, it is directed against the judge's finding that the Agency was entitled to recoup its debt owed by Mr. Coulter from the compensation money held by the Commissioner on Mr. Coulter's behalf. The judge held that the compensation represented a conversion or transmutation of the Agency's security on Mr. Coulter's land into money, and that the Agency was entitled to enforce its security under the mortgages against that money, in preference to ordinary judgment creditors. In addition we allowed Mr. Kanji to argue, in support of the judgment, that the Agency, by reason of its mortgages, had stepped into Mr. Coulter's shoes and was entitled to receive from the Commissioner so much of Mr. Coulter's compensation as would satisfy its judgment debt by virtue of the security of the mortgages, an issue on which the judge made no finding. As to these matters, Mr. N. M. Patel argued that any security provided by the mortgages was secured on the land, and not on the improvements, and that this security was destroyed with the revocation of the right of occupancy. As to the judge's decision that the compensation payable to Mr. Coulter represented a conversion of the security on the land into money, Mr. Patel submitted that what was converted into money was not the land, but the unexhausted improvements on the land, and that the mortgages were secured on the land, and not on the improvements. One has only to refer to the deeds of mortgage to appreciate the force of these arguments. The security in each

case was the right of occupancy and nothing else, and when the right of occupancy was revoked, the security was destroyed. It seems strange that the forms of mortgage prescribed under the Land Registration Ordinance (Cap. 334) in respect of land held under rights of occupancy do not provide for additional security in the event of the revocation of the right of occupancy, for instance by the inclusion of a covenant that in the event of the right of occupancy being revoked, the mortgage debt shall be secured additionally on any compensation payable to the mortgagor on such revocation in respect of unexhausted improvements. I find myself in agreement with Mr. Patel's submission that the compensation payable on the revocation of a right of occupation in respect of unexhausted improvements cannot be regarded as a conversion or transmutation into money of the land itself. For these reasons I would allow the appeal, order that the judgment and decree be set aside, and direct that the moneys in court be distributed rateably amongst the decree holders including the Agency. Mr. N. M. Patel and Mr. N. P. Patel, who each represent two of the four appellants, have asked for costs to be awarded to each group of appellants. As only one record and a joint memorandum of appeal were filed, I consider that the proper order is for the appeal to be allowed with costs, and the cross-appeal to be dismissed with costs, such costs to include an instructions fee for each of the two advocates who appeared for the appellants. The order for costs in favour of the respondent in the court below should be set aside and an order for costs in favour of the appellants substituted. If the money in court, or any part thereof, has been taken out by or on behalf of the respondent, it must be repaid into court.

Sir Charles Newbold P: The facts relating to this matter are set out in the judgment of Law, J.A. and I shall only restate those facts as are necessary to give point to my reasoning.

On this appeal and cross-appeal two points of some difficulty arise, but before I deal with either of these points I should like to dispose of two minor matters. First, the appellants urged, and it was their first ground of appeal, that the procedure adopted by the respondent (the Agency) in bringing this matter before the courts was incorrect. I have no doubt that it was incorrect; but the action of the judge who heard the original application in adjourning the matter and in directing that all the creditors be served resulted in the appellants and the Agency being able to place their respective cases before the court and this they did. In these circumstances I was satisfied that the procedural irregularity had been cured and that no party to these proceedings had been prejudiced by the original irregularity. Accordingly, I joined with my brethren in rejecting this ground of appeal without asking for any argument on it from Mr. Kanji, who appeared for the Agency.

The next matter was that during the hearing of the appeal and cross-appeal (which were heard together with the consent of all parties) there was a suggestion by Mr. Kanji that there was no evidence of any incoming occupier on whom the liability fell to pay to Mr. Coulter the amount of the unexhausted improvements on the land, the subject of his revoked right of occupancy, and that as a result the money in question was not Mr. Coulter's money and therefore not liable to attachment by his creditors. This point was never taken in the court below nor is it the subject of a cross-appeal. The entire proceedings in the court below were conducted on the factual basis that the money in question was due to Mr. Coulter from the occupier under a new right of occupancy. As a result no evidence was given as to whether or not there was an incoming occupier. It is far too late to take a point of this nature on appeal when, had the point been taken earlier, evidence might have been given on the subject so as to clear up any ambiguity. In any event, the whole object of these proceedings is to

ascertain the priorities in respect of this money. Should a decision be given on the basis that the money was not Mr. Coulter's, then a great deal of time and money would have been wasted; the Tanganyika Farmers' Association would have to return the money they had received in settlement of Mr. Coulter's debt to them and all the proceedings would either have to be reheard or determination of the real point would have to await the incoming of a new occupier under a new right of occupancy. I reject, therefore, any suggestion that in these circumstances the appeal be determined on the basis that there was no evidence that the money in question was money payable to Mr. Coulter by the new occupier of the right of occupancy in discharge of his statutory liability.

The main point which arises on the appeal is whether the charge created by the mortgage attached to the money receivable by Mr. Coulter in respect of unexhausted improvements (hereinafter referred to as the compensation) following the revocation of his right of occupancy. It is urged that it does on three separate grounds. The first is that the Agency as mortgagee is in the position of Mr. Coulter, who was the occupier under the right of occupancy, and is thus entitled to receive the compensation. The second is that under an equitable doctrine the Agency can trace the money it lent to Mr. Coulter into the improvements and thus into the compensation. The third is that the charge created by the mortgage attaches to the compensation into which the right of occupancy has been converted. The last two grounds, it is urged, are based on English principles of law and equity which apply in Tanganyika.

In considering these grounds it is necessary to consider the nature of the interest held by Mr. Coulter, the circumstances and the law relating to the mortgage of that interest and the circumstances under which Mr. Coulter becomes entitled to any compensation. The interest held by Mr. Coulter was a right of occupancy, which by s. 2 of the Land Ordinance (Cap. 113) is defined as "a title to the use and occupation of land". As was said in relation to a right of occupancy in *Premchand Nathu & Co. v. Land Officer*, [1962] E.A. 738 at p. 744:

"... the intention of the Land Ordinance was to establish an entirely new interest in land, similar to leases in some respects but different in others."

By s. 10 a right of occupancy may be revoked and by s. 14 the new occupier of a right of occupancy has to pay to the President, on behalf of the previous occupier, the amount found to be due in respect of unexhausted improvements on the land at the date of the new occupier's entry. By ss. 2 and 3 of the Land (Law of Property and Conveyancing) Ordinance (Cap. 114) the law of England in relation to real and personal property, mortgagor and mortgagee and trusts and trustees in force on 1 January 1922, applies in Tanganyika, subject to the circumstances of Tanganyika and its inhabitants. By s. 57 of the Land Registration Ordinance (Cap. 334):

"a mortgage shall, when registered, have effect as a security and shall not operate as a transfer of the estate thereby mortgaged, but the lender shall have all the powers and remedies in case of default and be subject to all the obligations that would be conferred or implied in a transfer of the estate subject to redemption."

In 1960 Mr. Coulter, who was the owner of a right of occupancy, mortgaged it to the predecessor of the Agency on two occasions to secure the repayment of a total sum of Shs. 126,000/-, but there is no evidence as to what that sum was expended on. In 1964 Mr. Coulter's right of occupancy was revoked and he subsequently became entitled to £8,166 from the new occupier in respect of the unexhausted improvements on the land.

Dealing with the first ground, I do not accept that s. 57 of the Land Registration Ordinance entitles the Agency to be treated as if it had been the occupier of the land and thus receive the amount payable as compensation. All that s. 57 does is to give to a mortgagee the powers and remedies it would have had if the right of occupancy had been transferred by the mortgage to the mortgagee subject to the equitable right of redemption; and these powers and remedies are quite different from the right of the mortgagor to receive money for unexhausted improvements. Even if the mortgagee were to be regarded as a mortgagor so as to receive the money so due, that money would be received by the mortgagee qua mortgagor and not qua mortgagee; and the money so received would thus be liable to the claims of the creditors of the mortgagor and the mortgagee would have no priority.

As regards the second ground, the equitable doctrine of tracing the assets arises only in certain special circumstances arising out of a fiduciary relationship, and those circumstances do not include the ordinary position of mortgagor and mortgagee. In any event, there is no evidence as to what was done with the money lent to Mr. Coulter and thus there is no ground whatsoever for considering that the money lent by the Agency can be traced to the money received by Mr. Coulter as compensation.

As regards the third ground, it is submitted that the right of occupancy has been converted into the money received for unexhausted improvements and that the charge over the right of occupancy has become a charge over the money into which the right of occupancy has been converted. The trial judge held that such was the position, quoting with approval the following statement from Fisher's Law of Mortgage at p. 836:

"The right of the owner of property generally, and therefore of one who has a pledge or other security thereon, is not destroyed by the mere transmutation of its subject matter into a different form without his assent."

The trial judge cites no authority for applying any such principle of law to the facts of this case. I accept that there may be circumstances in which the charge is not destroyed by the mere transmutation of the subject matter of the charge; but that is a very different thing from saying that a charge continues to attach to something into which the subject matter of the charge has been transmuted. The equitable doctrine of conversion is very much more limited in its effect than the trial judge seems to imply. I find myself unable to agree with him that under English Law the doctrine applies to the circumstances of this case. For example, a charge over property which is insured does not, in the absence of any special statutory or contractual provision, become a charge over money payable under the policy of insurance on the destruction of the property. (See *Lees v. Whitley* (1866), L.R. 2 Eq. 143 and *Sinnott v. Bowden*, [1912] 2 Ch. 414.) Moreover, the law of Tanganyika in relation to rights of occupancy is, as I have already said, so different from the law of England that equitable principles should be applied with the greatest caution. I consider that the charge created by the mortgage of a right of occupancy is a charge over the right to use and occupy public land. This is a purely usufructuary right; thus the charge ceases to exist when the subject matter of the charge ceases to exist, as there is no res to which an action in rem can apply. As the charge ceases to exist when the right of occupancy is revoked it cannot continue to apply to anything. Finally, I do not consider that the right of occupancy on revocation can be said to be transmuted into money payable for the unexhausted improvements as this money may vary from little or nothing to a very considerable amount and bears no relation to the right to use and occupy the land. Thus the doctrine in relation to transmutation could not in any event apply. Accordingly, the trial

judge was wrong in holding that the charge created by the mortgage attached to the money in the hands of the Commissioner of Lands on behalf of Mr. Coulter.

The main ground on the cross-appeal is whether the terms on which the Treasury provided the funds which were to be used to pay the money due to the outgoing occupiers of revoked rights of occupancy in respect of unexhausted improvements had the effect of determining that Mr. Coulter's debt to the Agency should be paid out of such money due to him. The trial judge held that they did not, but the Agency submits the trial judge was wrong in so holding. I cannot help feeling that there has been some confusion and lack of clarity in respect of the legal position of each of the persons involved in the transactions consequent on this agreement, and that some of the resultant relationships have not been fully appreciated and have been telescoped without any real attempt to understand the true position and the successive steps which followed from the implementation of the agreement.

It is important to realise at once that the money provided by the Treasury was a global sum designed as an act of policy to enable persons to acquire revoked rights of occupancy which they would not otherwise have been able to acquire, as they would not have been able to raise the money necessary to discharge their statutory liabilities in respect of the payment to the previous occupiers of the amounts due for unexhausted improvements.

The money was provided by the Treasury to the Agency in the form of a loan of a total sum of £120,020 "for the specific purpose of enabling" the Agency "to make loans to the new occupiers of agricultural land over which the former rights of occupancy have been revoked so that they may pay for the unexhausted improvements". Under the terms of this agreement the loan to the Agency was to be for five years and the money provided under the loan was to be used solely for the purpose specified. Although no specific reference was made to this effect in the detailed provisions of the agreement, it is clear that the Agency was to make a loan to each of the persons who was to acquire a revoked right of occupancy of an amount equal to the statutory liability of that person to the previous occupier in respect of unexhausted improvements. The statement in the agreement that the Agency, on receipt of the money from the Treasury, was forthwith to pay the sum to the Commissioner of Lands is obviously resultant from a confused telescoping of the position, as the Agency would first have to arrange a loan from itself to the new occupier. When this had been done the Agency would on behalf of the new occupier pay the amount of that loan to the Commissioner of Lands who would receive it as representing the amount which the new occupier would have to pay to the President on behalf of the previous occupier under s. 14 (b) of the Land Ordinance. Thus, when the money came into the possession of the Commissioner of Lands, the legal position of each of the parties was that the Treasury had made a global loan to the Agency, the Agency out of that global loan had made a loan to each new occupier of an amount equal to his liability for unexhausted improvements, and each new occupier had paid to the Commissioner of Lands, as representing the President, the amount which that new occupier owed under statute to the old occupier. The agreement between the Treasury and the Agency sought to impress upon the money paid to the Commissioner of Lands, which money as I have said was received by the Commissioner of Lands from the new occupiers in discharge of their statutory liabilities to the previous occupiers, conditions as to the disposal of that money. The answer to the point raised on the cross-appeal depends on whether the Treasury has power so to do. I am quite satisfied that it had no such power. It is clear that, as the loan by the Treasury to the Agency was a voluntary one made by the Treasury under no legal liability, the Treasury could impress upon the money loaned a direction as to how that

money was to be used and a trust that in the event of it not being so used it was to revert to the Treasury. (See *Barclays Bank Ltd. v. Quistclose Investments Ltd.*, [1968] 3 All E.R. 651.) This direction and trust could be impressed on the money as the Treasury was under no legal liability to make a loan, and if it decided to do so it had full power to say that the money should be used only for a certain purpose and if it was not used for that purpose it should revert to the lender. Such a direction and trust would obviously bind the borrower; and the trust for reversion would bind any person who received the money on behalf of the borrower with knowledge of the purposes for which the money was to be used. But once the borrower had himself complied with the purposes for which the money had been lent to him, the lender could not impress upon the money, which had passed out of the borrower's hands, any further direction as to its manner of user as the lender would have no further powers over the disposal of the money. Thus the Treasury could impress upon the money loaned to the Agency a direction that it was to be used only for the purpose of making loans to new occupiers of rights of occupancy so as to enable them to discharge their statutory liabilities, but it could not impress on the money any direction as to its further user. The Agency in turn could impress upon the money which it advanced to each new occupier a direction that the money lent was to be used only for the purpose of discharging the new occupier's statutory liability to previous occupiers, as, apart from the agreement with the Treasury, the Agency was under no legal duty to lend the money to the new occupier. But equally well the Agency could not impress upon the money any direction as to its future user when it came into the hands of the previous occupier. In fact, the Agency carried out the direction impressed upon the money advanced to it by relending it to the new occupiers, and the new occupiers carried out the direction impressed upon the money by the Agency by using the money to discharge their statutory liabilities. None of the parties may have appreciated precisely what he was doing and what the true position was, but that is in law what happened when the Agency, carrying out the terms of the agreement, placed into the hands of the Commissioner of Lands the money which it had received from the Treasury. There, however, the chain breaks down, because when the new occupier notionally passed to the Commissioner of Lands, representing the President, the money which he owed under a statutory liability he has no power to impress upon it any direction as to its user, as he was under a statutory liability to discharge his debt. He could no more tell the previous occupier that the money he owed to the previous occupier was to be used for satisfying the previous occupier's debts than any debtor, when he discharges his debt, could tell his creditor that the money which the creditor receives is to be used for any particular purpose. Thus the money in question in the hands of the Commissioner of Lands was money received by him from the new occupier on behalf of Mr. Coulter and this money, which forms part of the general assets of Mr. Coulter, was not and could not be made subject to any charge having priority over the general creditors of Mr. Coulter. In these circumstances the Agency had no prior right to obtain payment of the debt owed to it by Mr. Coulter over any other creditor of Mr. Coulter who was also a decree holder. Accordingly, the money held by the Commissioner of Lands is to be used rateably in the satisfaction of the creditors of Mr. Coulter who are decree holders.

For these reasons I would allow the appeal and dismiss the cross-appeal. I agree with the order proposed by Law, J.A. and accordingly it is so ordered.

Duffus VP: I have had the considerable advantage of reading the judgments of Law, J.A. and Sir Charles Newbold, P. in draft form.

This case concerns the rights of a mortgagee over a right of occupancy granted by virtue of the Land Ordinance.

A right of occupancy is defined in the Land Ordinance (Cap. 113) as meaning “A title to the use and occupation of land”. The right in this case was granted to a Mr. Coulter by virtue of s. 6 of the Ordinance. The grant was for a term of years subject to the payment of rent.

A right of occupancy can be revoked by the President for good cause as set out in s. 10. The right of occupancy in this case was revoked on 30 October 1964.

Section 14 (b) provides for payment to the occupier when the right of occupancy terminates for any “unexhausted improvement” existing on the land. The relevant portion of s. 14 states:

“Every certificate of occupancy shall be deemed to contain provisions to the following effect:

- (a) . . .
- (b) that the occupier binds himself to pay to the President on behalf of the previous occupier, if any, the amount found to be payable in respect of any ‘unexhausted improvements’ existing on the land at the date of his entering into occupation;”.

The facts have been fully set out in the judgment of Law, J.A. It was established that the President for good cause revoked Mr. Coulter’s right of occupancy and further that the amount of Shs. 123,940/- was payable to Mr. Coulter as the assessed value of the “unexhausted improvements” on the land the subject of the grant. This amount was paid to the Commissioner of Lands and on the order of the Court paid into Court.

Mr. Coulter mortgaged his right of occupancy to the Land Bank of Tanganyika to secure two loans. There were two mortgages both made by instruments under the Land Registration Ordinance, 1955, Cap. 334 and duly registered under that Ordinance. The respondent Agency are the successors in title to the Land Bank of Tanganyika and are entitled to the benefit of the mortgages. Mr. Coulter made default in the payment of his mortgage debt and after his right of occupancy had been revoked the respondent Agency brought an action to recover the balance due under the mortgages and judgment was entered in its favour for the amount due. The four appellants in this appeal are commercial companies who also recovered judgments against Mr. Coulter. Mr. Coulter has left Tanganyika and apparently the only asset available to the four appellants and the respondent Agency is the amount payable to Mr. Coulter for the “unexhausted improvements” on the land. These proceedings are to determine the rights of these various creditors of Mr. Coulter to this amount and especially to determine whether the respondent Agency has preferential rights by reason of its mortgages.

The question as to how this amount came to be paid in to Court and as to whether the respondent Agency was entitled to this amount by virtue of the terms and conditions under which the amount was made available by Treasury has been fully dealt with by the learned President and Law, J.A. and I entirely agree with their views on this matter. I also agree that there was no merit in the procedural objection raised by the first ground of Appeal.

The main point on this appeal is whether the respondent Agency is by virtue of its mortgages entitled to the amount payable to Mr. Coulter for the “unexhausted improvements” to the land.

It is necessary to first determine the exact nature of an “unexhausted improvement”. This is defined by s. 2 of the Land Ordinance as follows:

“unexhausted improvement” means any thing or any quality permanently

attached to the land directly resulting from the expenditure of capital or labour by an occupier or any person acting on his behalf and increasing the productive capacity the utility or the amenity thereof, but does not include the results of ordinary cultivation other than standing crops or growing produce.”

Rule 8 of the Land Regulations further explains the meaning of “unexhausted improvements” and states:

- “(a) compensation shall be payable in respect of permanent improvements on the land which are of the nature specified in the First Schedule hereto;
- (b) the amount of compensation which shall be payable shall be the amount which would fairly represent the value of the improvements to the income occupier as determined by the President, whose decision shall be final.”

The “permanent improvements” referred to in r. 8 are set out in the 1st schedule and includes such things as farm buildings, fencing, wells, roads, irrigation, planting of trees, long-lived crops and other work of a permanent nature. An “unexhausted improvement” is therefore the extent to which the owner of the right of occupancy has during the term of his tenure permanently improved the land. It has to be an improvement that attaches to the land itself and that goes with the land. In fact it represents the value of the occupier’s interest in the land once his right of occupancy has ceased. The question is, has a mortgagee of a right of occupancy any right or interest in the value of this unexhausted improvement? The mortgages in this case are both made under the Land Registration Act and follow the form provided by that Act. (L.R.11 as set out in the second schedule of the Act.) There are special provisions for registered mortgages under the Act and in particular s. 57 provides inter alia that:

“A mortgage shall, when registered, have effect as a security and shall not operate as a transfer of the estate thereby mortgaged, but the lender shall have all the powers and remedies in case of default and be subject to all the obligations that would be conferred or implied in a transfer of the estate subject to redemption.”.

A mortgagee is therefore once default has been made placed in a position similar to a purchaser of the right of occupancy. In this respect a right of occupancy can be sold but only with the approval of the President. It is clear that the purchaser of a right of occupancy who has the estate transferred to him would be the person entitled to any amount that may be found payable for an “unexhausted improvement”. In the same way a mortgagee under the Land Registration Act of a right of occupancy would have the same powers as would be conferred on a purchaser in a transfer of the right of occupancy and would, therefore, in my view, be entitled to a charge on any proceeds that may be found payable to the mortgagor. This charge would, of course, only be to the extent of the amount secured by the mortgage and any surplus would be payable to the mortgagor and would be liable to attachment by the unsecured creditors.

I am of the definite view that this must be the correct interpretation of s. 57. It is certainly the most equitable and common sense point of view as otherwise the mortgagee’s security over a right of occupancy would be of little value, as a dishonest mortgagor could cause the Government to forfeit his right of occupancy and then collect his compensation for the value of the “unexhausted improvement” and then as in this case, leave the country and leave the mortgagee

without any security holding only his bare rights against the mortgagor personally; this, even though the mortgagor might have used the entire loan covered by the mortgage to carry out the very “unexhausted improvements” on the land for which the mortgagor has collected the compensation.

By the provisions of the Land (Law of Property and Conveyancing) Ordinance (Cap. 114), the law in force in England on 1 January 1922 relating to real and personal property, and mortgagors and mortgagees, applied to and was in force here subject to local circumstances and to the statutory enactments of this country.

The system of land tenure is completely different in England and there is no parallel in England for the tenure given by a right of occupancy. The rights of a mortgagee in England are largely laid down by statute and it is difficult to find any English Law that would be of assistance in the decision of this case. Generally speaking, though the following passages taken from Fisher and Lightwood’s Law of Mortgage (7th Edn.) p. 28, would appear to summarise the position with regard to changes or accretions to the security in England.

“The mortgagee will be entitled, for the purposes of the security, to all such interests as may be acquired, either as accretions to, or in place of his original interest.”

and farther

“All incidental rights, such as the goodwill of a business carried on upon and inseparably connected with the mortgaged property, and compensation for such goodwill when the property is taken compulsorily, will follow the security (*h*), unless the goodwill is owing to the personal skill of the mortgagor.”

The cases which may be referred to in this respect are:

Doe v. Pott (1781), 2 Dougl. 709 (99 E.R. 452),

Webster v. Power (1868), L.R. 2 P.C. 69,

Cooper v. Metropolitan Board of Works (1883), 25 Ch. D. 472,

Pile v. Pile, Ex p. Lambton (1876), 3 Ch. D. 36 (see the judgment of Hall, V.C. at p. 39), and

The Law Guarantee Trust Society v. Mitcham, [1906] 2 Ch. 98.

None of these cases are, however, of any real assistance and the interpretation must, in my view, be decided on our local enactments.

What was, in fact, the security given by the mortgagor? A right of occupancy gives the owner first the exclusive right to use and occupy land and secondly, a right to the value of any “unexhausted improvement” on the land. There might, of course, be no such improvement and then no amount is payable but if there is, the owner of the right of occupancy has a statutory right to this amount. This statutory right to compensation is always attached to the right of occupancy and is one of the conditions under which the tenure of a right of occupancy is created. It is a part of the title of the owner of the right of occupancy, it passes with his title if he sells his right of occupancy and in my view, it must also pass with the title which he gives his mortgagee when he borrows money and secures this by pledging his title.

This aspect of the matter was argued before the trial judge but he preferred to base his decision on the doctrine of conversion and gave no ruling on this question. It was, however, again argued before us by consent by the respondent’s advocate when supporting the judgment.

With respect, I am of the view for the reasons stated, that s. 57 of the Land Registration Ordinance

applies and accordingly the mortgages would extend to

and give the mortgagees, the respondent Agency a charge over the amount payable for the “unexhausted improvements” and that the equitable doctrine of conversion really does not apply here. I would accordingly have dismissed the appeal.

Appeal allowed.

For second appellants:

N. P. Patel (instructed by *Natubhai Patel, Desai & Co.*, Dar-es-Salaam).

For third and fourth appellants:

N. M. Patel (instructed by *Donaldson & Wood*, Dar-es-Salaam)

For the respondent:

S. Kanji and *A. Lakha* (instructed by *Fraser, Murray, Roden & Co.*, Dar-es-Salaam)

Re Barton
[1970] 1 EA 191 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	7 August 1969
Case Number:	22/1969 (153/69)
Before:	Chanan Singh J
Sourced by:	LawAfrica

[1] *Legitimacy – Child born out of wedlock – Whether subsequent marriage of mother legitimates child – No evidence that mother’s second husband was father of the child – Legitimacy Act 1926, s. 1 (1).*

[2] *Probate and Administration – Succession – Illegitimate – Whether illegitimate entitled to share in residual estate of deceased half brother – Indian Succession Act 1865, s. 92.*

[3] *Statute – Construction – Succession – Illegitimate child not included – Indian Succession Act 1865.*

Editor’s Summary

The Public Trustee had applied for declarations in regard to the estate of Edward James Barton who died partially intestate. The testator’s mother, Agnes Cole, married Edward Barton on 31 January 1875, and their son, the testator Edward James Barton was born on 12 October 1875. His father, Edward Barton, died on 16 July 1880, and on 16 November 1881, his mother, Agnes Barton, gave birth to a daughter, Clara Isabella. Eight months later, Agnes Barton married her second husband, Gustave Bauer and had two sons by him, Frederick and Sidney Bauer. Sidney died unmarried in 1953 and Frederick died in 1956 leaving one daughter Irene. In the will of Edward James Barton, legacies were given inter alia, to his

half-brothers Frederick and Sidney and to Clara Bauer, who was described as his mother's adopted daughter.

The point in issue on behalf of the Public Trustee was whether Clara, being an illegitimate child of Agnes Barton, should share in the residual estate of the deceased. Counsel for the children of Clara argued that Clara should be presumed to be the child of Agnes and Gustave Bauer and that she became legitimate on the passing of the English Legitimacy Act 1926. It was further argued that Clara, although illegitimate, could share in the residual estate of the deceased under the Indian Succession Act 1865.

Held –

- (i) there was insufficient evidence to support the presumption that Clara was the child of Gustave Bauer;
- (ii) Clara was the illegitimate child of Agnes Barton;
- (iii) an illegitimate child cannot succeed to an intestate estate (*Smith v. Massey* (1) followed);
- (iv) the issue of Clara Barton could not share in the residuary estate of Edward Barton.

Declaration granted as prayed.

Case referred to in judgment:

(1) *Smith v. Massey* (1906), I.L.R. 30 Bom. 500.

Judgment

Chanan Singh J: Mr. and Mrs. James Edward Cole of some address in the United Kingdom had two daughters. One, Louisa A. Cole, married an Australian farmer and presumably went to live with him. Nothing further is known of her. The second daughter, Agnes Caroline Cole, married Edward Barton on 31 January 1875. They had a son Edward James Barton born to them on 12 October 1876. Edward Barton died on 16 July 1880.

On 17 November 1881, i.e. 16 months after the death of Edward Barton, a daughter was born to Agnes. She was given the names of Clara Isabella. Some eight months later, Agnes married her second husband Gustave Bauer and had by him two children, Frederick Gustave Bauer (born 23 September 1883) and Sidney Victor Bauer (born 2 March 1888). The latter died unmarried on 28 April 1953 and we are not concerned with him. The former died on 15 May 1956 leaving one married daughter Irene Ethel Lioret. His widow is already dead.

Edward James Barton came to live in Kenya and died domiciled here on 25 August 1956. He left a will made on 28 June 1904, which gave legacies as follows:

£1,000	1. To stepfather Gustave Bauer
Bauer	2. To half-brother Frederick Gustave
£1,000	£1,000
Clara Bauer"	3. To half-brother Sidney Bauer
Cole)	4. "To my mother's adopted daughter
£25	£1,000
£50	5. To aunt Louisa (formerly Louisa
	£500
	6. To friend Miss Bessie Simmons
	7. To friend Miss Julia Kallik
	8. Charitable bequest Residue

The bequest to charity was declared invalid and void in Miscellaneous Civil Cause 99 of 1966. The Public Trustee has now applied for several declarations in relation to the distribution of the estate.

One of the declarations sought is to the effect that the bequests to the persons who predeceased the deceased have lapsed. It does not appear any such declaration is necessary because the point is covered by s. 92 of the Indian Succession Act. I realise, however, that it is not easy in a case like this to trace all the legatees. It appears from the petitioner's affidavit that the following beneficiaries died before the

testator's death:

His mother Agnes Caroline Bauer.

His stepfather Gustave Bauer.

His half-brother Frederick Gustave Bauer.

His half-brother Sidney Victor Bauer.

Legacies in their favour, therefore, lapsed. The testator's "mother's adopted daughter Clara Bauer" was undoubtedly Clara Isabella born on 17 November 1881. She was alive at the date of the testator's death. Therefore, the thousand pounds given to her belongs to her children.

It is not known what efforts have been made to trace the other three legatees.

It may be worthwhile inserting an advertisement in the newspaper circulating in the locality where each one of them was last known to reside.

To come now to the main question argued before me by Miss Kamla Madan, for the Public Trustee, and Mr. Le Pelley for the children of the said Clara Isabella. Miss Madan's contention is that Clara being an illegitimate child of Agnes is not entitled to a share in the residual estate of the deceased. She quotes in her support the case of *Smith v. Massey* (1906), I.L.R. 30 Bom. 500 at p. 504. There, Batchelor, J., of the Bombay High Court says in relation to the Succession Act: "The Act is an English Act, and, . . . must be read as part of a system of law which has refused to follow even the Civil Law in its relative tenderness towards illegitimate children. Since the Act speaks of certain relations without more, I infer that the only relations contemplated are those which the law recognizes. There can be no doubt that in an English Act of Parliament the word 'child' always applies exclusively to a legitimate child." The term "English Act" used by the learned Judge means, I think, English Law enacted by the Indian legislature. It is well known that apart from one or two changes which were deliberately made in the interests of simplicity and justice, the Succession Act incorporated the English law as it existed then. It is not open to dispute that in English law an illegitimate child was not regarded as a child.

Mr. Le Pelley does not accept this view, his argument being twofold.

First, he says that Clara should be presumed to be the child of Agnes and Gustave Bauer. Agnes's first husband died on 16 July 1880. Clara was born on 17 November 1881. Agnes and Gustave Bauer married on 25 July 1882. Clara was then 8 months old and she must have been accepted into Bauer's house along with her mother. Under the English Legitimacy Act 1926, s. 1 (1), Clara would become "legitimate from the commencement of this Act, or from the date of the marriage, whichever last happens". It should be observed that this happens only "where the parents of an illegitimate person marry". To accept Mr. Le Pelley's argument, one has to assume that Gustave Bauer was the father of Clara.

What is the evidence in support of this? The fact of subsequent marriage is some slight evidence. It does not appear, however, that Gustave Bauer ever recognised his paternity. He married Agnes on 25 July 1882 and did not die until 5 April 1935. Clara married in 1914. Thus, there was ample time for Gustave Bauer to acknowledge his paternity in some way. He made his will on 28 February 1955 and gave parts of his estate to his grand-daughter (Irene Ethel), to his sons Gustave Frederick Bauer and Sidney Victor Bauer, to his stepson Edward James Barton, to the husband of his grand-daughter, to one Mrs. Emily Fairbrass. Clara was not mentioned in the will at all. In these circumstances, it is difficult to assume that Gustave Bauer was the father of Clara.

On the other hand, the deceased (E. J. Barton) acknowledged his relationship by leaving her a legacy of £1,000, although, it should be noted, he called her "Clara Bauer".

Clara's mother in her will includes her among her "dear children" under the name of "Clara Isabella Barton".

The Birth Certificate of Clara shows her father's name as "Edward Barton deceased". Her marriage certificate shows her own name as "Clara Isabel Barton" and her father's name as "Edward James Barton (Deceased)". The Birth Certificate of Clara's daughter Therese Joan shows the mother's name as "Isabel Peterson formerly Barton".

All this shows, I think, that she was never acknowledged by Gustave Bauer

as his daughter. Why Barton's name was used as father is not difficult to understand. I hold that Clara Isabella was the illegitimate daughter of Agnes Caroline Barton.

Secondly, Mr. Le Pelley argues that I should ignore the *Smith* case and say that Clara, although illegitimate, was entitled to a share in the deceased's property as his sister. He says that the Indian Succession Act does not define the word "child" except in s. 87 which occurs in Part XI dealing specifically with "Construction of Wills". He mentions the case of relations of half blood who are treated by the Act on a footing of equality with the relations of full-blood, although English law recognised only full-blood relationship for purposes of intestate succession. The position seems to be that the Indian law even in this respect followed English law which has been altered by Statute 3 and 4 Will. IV. C. 106. The only difference was that English law still maintained the distinction between a half-brother through mother and a half-brother through father. The Indian law abolished this distinction also.

I do not see how I can ignore the judgment of Batchelor, J. It follows English authorities and there are no contrary authorities from India. Again, s. 87 gives some indication of the intention of the legislature. If Mr. Le Pelley's view is correct it means that in the case of a partial intestacy, legacies to children will go to legitimate children only whereas the other part of the estate will be divided among all children, legitimate and illegitimate. I do not think that was the intention of the legislature.

I hold, therefore, that an illegitimate child cannot succeed to an intestate's estate, and the issue of Clara Isabella are not entitled to share in the residuary estate of Edward James Barton. In the result, I grant the declaration prayed for in paragraph (a) of the petition.

As regard paragraph (b), since Frederick Gustav Bauer died before 5 August 1956, his children have the same degree of kindred as the deceased's aunt Louisa A. Cole. According to the family tree attached to the Public Trustee's affidavit, he left only one daughter Irene Ethel. Therefore, if Louisa A. Cole was living on 5 August 1956 the residuary estate should be divided equally between Louisa and Irene Ethel. If she was not alive, then Irene Ethel is entitled to the whole residue because Louisa's children would be in the 4th degree of kindred against Irene Ethel's 3rd degree. I grant a declaration in these terms.

As regards paragraph (c), I have already stated my opinion that a declaration is not necessary in view of clear law on the subject. If it be necessary, however, I grant it.

Declaration granted as prayed.

For the applicant:

Miss Kamla Madan (Assistant Public Trustee)

For the respondent:

P. Le Pelley (instructed by *Hamilton Harrison & Mathews*, Nairobi)

Dodhia v National & Grindlays Bank Ltd and another
[1970] 1 EA 195 (CAN)

Division: Court of Appeal at Nairobi

Date of judgment: 21 November 1969

Case Number: 53/1968 (159/69)
Before: Sir Charles Newbold P, Duffus VP and Law JA
Sourced by: LawAfrica
Appeal from: The High Court of Kenya – Chanan Singh, J.

[1] *Banking – Letter of hypothecation – Signed but not attested – Whether valid inter partes – Effect of non-attestation – Chattels Transfer Act (Cap 28) s. 15 (K).*

[2] *Chattels transfer – Letter of hypothecation – Signed but not attested – Whether valid inter partes – Effect of non-attestation – Chattels Transfer Act (Cap. 28) s. 15 (K).*

[3] *Contract – Licence – Licence to enter premises and seize goods – Whether licence which can be revoked by licensor.*

[4] *Judicial precedent – Stare decisis – Court of Appeal – Whether bound by its previous decisions – Circumstances in which it will refuse to follow previous decisions.*

[5] *Judicial precedent – Stare decisis – Court of Appeal – Whether bound by decisions of Privy Council on appeal from Court of Appeal – Circumstances in which it will refuse to follow such decisions.*

Editor's Summary

On 24 June 1960 and later, on 19 November 1961, National & Grindlays Bank Ltd. granted overdraft facilities to Dodhia on the security of three shops in Nairobi. All three letters of hypothecation were identical and under them, Dodhia agreed to “hypothecate to the Bank as a continuing security for payment of the amount from time to time and for the time being owing by us in respect of the said overdraft, all goods of the description appended hereto, in our disposition which are now in, or shall from time to time hereupon be brought into . . .” the particular shop. The Bank was further empowered to enter premises, take possession and sell the hypothecated goods if repayment of the amount outstanding was not made. None of the letters of hypothecation was attested or registered in terms of the Chattels Transfer Act.

On 14 and 15 July 1963 the Bank entered the shop premises and seized the goods therein, and instructed Peck & Barber as transporters, to carry the goods away from the shops. The goods were subsequently sold.

The plaintiff brought an action in the High Court claiming a declaration that the letters of hypothecation were wholly void and also damages for trespass and conversion of the goods; the Bank counterclaimed for the amount owing to it by the plaintiff. The High Court found that the letters of hypothecation were void. The appellant appealed. In *National & Grindlays Bank Ltd. v. Dharamshi Vallabhji and others* (21) the Privy Council had decided these issues in favour of the validity inter partes of such letters of hypothecation. Subsequently appeal to the Privy Council was abolished.

Held –

- (i) the Court of Appeal, while it would normally regard a previous decision of its own binding, should feel free in both civil and criminal cases to depart from such decisions when it appears right to do so;

- (ii) the same principles apply when the decision is a decision of the Privy Council on appeal from East Africa;

- (iii) since the decision concerns a minor matter of construction and not of any principle, the court should not depart from the decision of the Privy Council;
- (iv) the letters of hypothecation were valid inter partes (*National & Grindlays Bank v. Dharamshi Vallabhji and others* (21) followed);
- (v) the letters of hypothecation were intended to cover all goods of the plaintiff whether present or future;
- (vi) the letters of hypothecation gave the bank a means of enforcement without recourse to the courts by conferring on the bank a power of entry upon the plaintiff's premises;
- (vii) both in regard to existing goods and to future goods, seized, the bank had, before seizure, an interest in rem in the goods which precluded the plaintiff from withdrawing the licence to seize contained in the letters of hypothecation;
- (viii) the bank was entitled to use reasonable force to exercise its right of seizure and the force used was not excessive.

Appeal dismissed.

Cases referred to in judgment:

- (1) *R. v. Milton* (1827), 173 E.R. 1097.
- (2) *Wood v. Manley* (1839), 113 E.R. 324.
- (3) *Wood v. Leadbitter* (1845), 13 M. & W. 838.
- (4) *Holroyd v. Marshall* (1861), 11 E.R. 999.
- (5) *Blades v. Higgs* (1863), 142 E.R. 634.
- (6) *Collyer v. Isaacs* (1881), 19 Ch. D. 342.
- (7) *Lee v. Parkes Official Assignee in Bankruptcy* (1903), 22 N.Z.L.R. 747.
- (8) *Frith v. Frith*, [1906] A.C. 254.
- (9) *Hope v. Osborn*, [1913] 2 Ch. 349.
- (10) *Hurst v. Picture Theatres Ltd.*, [1915] 1 K.B. 1.
- (11) *In re Lind*, [1915] 2 Ch. 345.
- (12) *Lloyds Bank v. Bank of America*, [1938] 2 K.B. 147.
- (13) *Thompson v. Park*, [1944] 1 K.B. 408.
- (14) *Young v. Bristol Aeroplane Co. Ltd.*, [1944] K.B. 718.
- (15) *Winter Garden Theatre Ltd. v. Millenium Productions*, [1948] A.C. 173.
- (16) *Kabui v. R.* (1954), 21 E.A.C.A. 260.
- (17) *Bell v. Esselen* (1954), (1) S.A.L.R. 147.
- (18) *Kiriri Cotton Ltd. v. Ranchoddas Keshavji Dewani*, [1958] E.A. 239.

(19) *Poole v. R.*, [1960] E. A. 62.

(20) *Dharamshi Vallabhji v. National & Grindlays Bank Ltd.*, [1964] E.A. 442.

(21) *National & Grindlays Bank Ltd. v. Dharamshi Vallabhji and others*, [1966] E.A. 186.

The following considered judgments were read:

Judgment

Sir Charles Newbold P: This appeal raises a very important question of judicial policy and also some difficult questions of law. The circumstances in which this appeal comes before this Court are also unusual. Due to a decision of the Privy Council in the last appeal from Kenya which it entertained, the original judgment in one of the consolidated suits which gives rise to this appeal, which judgment was contrary to the decision by the Privy Council, was vacated by agreement and the case reheard by another judge on agreed facts. A number of points of law were argued. One of the main

legal issues, though raised in the High Court, was not argued there as it was agreed that the High Court was bound by the decision of the Privy Council, but this agreement was without prejudice to the right of the appellant to raise the issue before this Court. When I refer to the decision of the Privy Council I mean the majority decision of the Privy Council, as there was, for the first time, a dissenting judgment in the Privy Council. The facts agreed by the parties do not, as is so often the case, cover some matters which have turned out to be matters of some importance, and in some respects the agreed facts are vague and uncertain.

The facts on which this appeal is argued are as follows. On 24 June 1960, National & Grindlays Bank Limited (the Bank) granted overdraft facilities to Mr. Govindji Mulji Dodhia (the plaintiff) on the security of two letters of hypothecation, one in respect of the plaintiff's Bazaar Street shop and the other in respect of his Swamp Road shop. On 29 November 1961, the overdraft facilities were increased in respect of the Swamp Road shop on the security of a further letter of hypothecation. All three letters of hypothecation were on the Bank's printed form and were identical as far as the print was concerned, though there were a few minor and immaterial differences in the parts which were filled in in manuscript. In each case the plaintiff, in consideration of the Bank granting an overdraft in current account up to a specified amount, agreed to "hypothecate to the Bank as a continuing security for payment of the amount from time to time and for the time being owing by us in respect of the said overdraft all goods of the description appended hereto in our ownership or disposition which are now in or shall from time to time hereafter be brought into the . . ." particular shop. There were clauses relating to the value of the goods to be kept in the premises, keeping the hypothecated goods separate from other goods, giving power to the plaintiff to sell the hypothecated goods subject to crediting the proceeds of sale to the account, and other matters. By clause 9 the Bank or any person authorised by the Bank was empowered at any time or times to enter any place where the goods might be and "take and retain possession of the goods hereby hypothecated or any of them and of all or any promissory notes or bazaar chits for the time being held by us for the proceeds of the said goods heretobefore sold by us". By clause 10 the Bank was empowered, if repayment of the amount outstanding was not made on demand, to sell the hypothecated goods. None of these letters of hypothecation were attested or registered as required by the Chattels Transfer Act (Cap. 28).

On 14 and 15 July 1962, the Bank entered upon the shop premises and seized the goods therein and locked the shops and on a subsequent day Peck & Barber (the Transporters) acting as agents of the Bank, carried away the goods from the shops, which goods were subsequently sold.

The plaintiff filed a suit on 16 July 1962, against the Bank claiming, inter alia, a declaration that the letters of hypothecation were wholly void and damages for trespass and conversion of the goods, and the Bank counterclaimed for the amount owing to it by the plaintiff. On 14 July 1964, the plaintiff also filed a suit against the Bank and the Transporters claiming, inter alia, an account and damages. The first suit came before Miles, J. and it was agreed that he would first give a decision on the preliminary issue as to whether the letters of hypothecation were wholly void as they were not attested. After argument he held that they were. At about the same time the issue of whether letters of hypothecation which were not attested were wholly void was the subject of quite separate proceedings. It was held by this Court in *Dharamshi Vallabhji v. National & Grindlays Bank Ltd.*, [1964] E.A. 442, that unattested letters of hypothecation were wholly void. On appeal to the Privy Council (see [1966] E.A. 186) it was held that such letters were valid inter partes. As a result of

the Privy Council decision it was agreed to vacate the ruling of Miles, J., to consolidate the two suits, and to seek the decision of the High Court on certain of the issues which arose out of the consolidated suits, which issues were to be decided on agreed facts, and to incorporate that decision in a preliminary decree. There is also agreement as to the course to be pursued following on the determination of the issues placed before the Court. The first of these issues raised the question whether the letters of hypothecation were valid, but it was agreed that the High Court was bound by the decision of the Privy Council though it would be open to the plaintiff to raise the matter again in this Court.

In addition to the facts I have set out above, there is agreement upon the following further facts upon which this Court is asked to decide the issues which arise on appeal, which facts are as follows. First, that the Bank and the Transporters entered into the shops and seized the goods. Secondly, that certain goods not covered by the letters of hypothecation were removed and that the plaintiffs are entitled to damages in respect thereof. Thirdly, that a substantial proportion of the goods seized were acquired after the date of the last of the letters of hypothecation. Fourthly, that the letters of hypothecation were neither attested nor registered. Fifthly, that the goods were forcibly seized against the will of the plaintiff who had withdrawn or purported to have withdrawn the licence given in the letters of hypothecation to seize the goods. There is no agreement as to the amount of force used or as to the precise moment of the withdrawal of such licence, but it is agreed that the withdrawal was before the moment of actual seizure. Sixthly, that subject to such adjustments as may be necessary following on the determination of various matters the amount of the counterclaim is admitted.

The first issue is whether the letters of hypothecation are totally invalid by reason of the lack of attestation. If they are, then clearly the Bank and the Transporters are liable for their trespass in entering the premises and seizing the goods. As the decision of the Privy Council in the *Vallabhji* case (*supra*) given at a time when it was the final court of appeal from Kenya to the effect that unattested letters of hypothecation are valid inter partes would in the past have been binding on this Court, this issue raises the question of judicial policy as to the extent to which this court, now that it is the final court of appeal for Kenya, and indeed, also for Tanzania and Uganda, will continue to apply the principle of stare decisis. It would have been preferable if this matter could have been considered by a court composed of five members, but such was not possible and a decision by a court composed of three members is as effective as if it had been composed of five members. If there is to be any relaxation of the strict application of the principle, then there will fall for consideration the nature of the decision of the Privy Council given at a time when it was the final court of appeal, whether that decision was wrong and whether, even if it was wrong, this Court should now depart from it.

This court, when it was a subordinate court of appeal, has always considered itself bound by the principle of stare decisis in civil cases. The clearest exposition of the position is given by the then President, Sir Kenneth O'Connor, in the case of *Kiriri Cotton Company v. Dewani*, [1958] E.A. 239 at pp. 245 and 246. This principle required it to follow decisions of the Privy Council and, subject to limited exceptions, previous decisions of its own. In criminal cases the principle was relaxed to some extent, as this Court, while it considered itself bound to follow a previous decision of the Privy Council, did not consider itself bound to follow a previous decision of its own if it considered that by doing so its decision would result in an improper conviction. (See *Kabiu v. R.*, (1954), 21 E.A.C.A. 260 at p. 261.) Mr. Mackie-Robertson has submitted that this Court should follow the same strict application of the principle of stare decisis now that it is the final court of appeal. He has urged that the strict

application of the principle results in certainty in the law; that there is a greater need for certainty in a developing country than in a developed country; that without that certainty advocates would not know what to advise their clients, with the result that there would be a lack of uniformity and an unnecessary increase in litigation; and that changes in the law should be left to the legislature.

It is, I think, beyond dispute that since this Court became the final Court of Appeal for the sovereign countries of Kenya, Tanzania and Uganda no decision of the Privy Council or of any English court or of any foreign court is binding on this Court. Indeed, no such decision would be binding on any court in Kenya, Tanzania or Uganda, unless it was a decision of the Privy Council on an appeal from any of those countries, though in so far as any such decision sets out what is the English law, the High Courts of Kenya, Tanzania and Uganda would normally accept such to be the position and this Court would, I have no doubt, have regard to any decision of an English court setting out what is the English law. It would, however, always be a matter for the courts of Kenya, Tanzania and Uganda to decide what is the law of those countries. Even where English law is applied in any such country, its application would be subject to such modifications as the circumstances of the country and its inhabitants required; and it would be for the courts of such country to determine what those modifications, if any, would be in any particular case in order to determine what is the law of such country.

I accept that a system of law requires a considerable degree of certainty and uniformity and that such certainty and uniformity would not exist if the courts were free to arrive at a decision without regard to any previous decision. I also accept that subordinate courts are bound by the decisions of superior courts and that a subordinate court of appeal should normally be bound by a previous decision of its own. But there is a great difference between a final court of appeal and a subordinate court of appeal. If it is considered that a decision of a subordinate court of appeal was wrong it would always be open to have it tested and if necessary rectified in the final court of appeal. This would not be possible in the case of the decision of a final court of appeal. Thus, on the face of it, there is a need for greater flexibility in a final court of appeal than there is in any other court in the judicial hierarchy. Further, the need for such flexibility is the greater and not the less in a developing country, as there is a greater likelihood of rapid changes in the customs, habits and needs of its people, which changes should be reflected in the decisions of the final court of appeal. It should, moreover, be borne in mind that too strict an adherence to the principle of stare decisis would, in fact, defeat its object of creating certainty, as a final court of appeal faced by a decision which was unsuited to the present needs of the community would seek to distinguish it. The result of distinguishing a decision when there was no real difference results in uncertainty, an uncertainty which would not exist if it were clearly stated that the old decision was no longer the law. It must also be remembered that the Privy Council, when it was the final court of appeal for Kenya, Tanzania and Uganda, never considered itself bound by its previous decisions. It would seem a retrograde step for this Court, now that it has taken over the functions of a final court of appeal for these countries, to discard the flexibility previously possessed by the final court of appeal and instead adopt a position of rigidity.

For these reasons I am satisfied that as a matter of judicial policy this Court, as the final Court of Appeal for Kenya, Tanzania and Uganda, while it would normally regard a previous decision of its own as binding, should be free in both civil and criminal cases to depart from such a previous decision when it appears right to do so. It will, of course, exercise this power only after careful consideration of the consequences of doing so and the circumstances of the particular case, but I would not seek to lay down any more detailed guide

to the circumstances in which such a departure should take place as the matter would be best left to the discretion of the Court at the time it was up for consideration.

Having come to the conclusion that previous decisions of this Court are not necessarily binding, does it make any difference that the previous decision which falls for consideration in this case was that of the Privy Council given at a time when such a decision was binding on this Court? I am satisfied that it does not. This Court has now taken over the functions of the Privy Council as the final Court of Appeal. Previous decisions of the Privy Council on appeals from Kenya, Tanzania and Uganda are of precisely the same nature as previous decisions of this Court given after it became the final Court of Appeal for those countries. As Centlivres, C.J. said in *Bell & Co. v. Esselen* (1954), (1) S.A.L.R. 147 at p. 154 when the Supreme Court of South Africa was placed in a similar position to that in which this Court is now placed:

“As this Court is now the final court in respect of appeals from courts in the Union, it must naturally have the power which the Privy Council had . . . of departing from an erroneous decision of the Privy Council. This Court will naturally exercise that power with circumspection. . . .”

The next question is whether the decision of the Privy Council in the *Vallabhji* case (*supra*) was a wrong decision. It is notable that in that case all the members of this Court and the trial judge, together with Miles, J. in this case, were in agreement that the lack of attestation rendered the letters of hypothecation totally invalid. This matter related to the construction of Kenya legislation, and while I hold the views of members of the Privy Council in the greatest respect, it would seem that judges of the independent country of Kenya are in a better position to determine the true construction of Kenya legislation than judges who are unaware of the conditions and needs of the people of Kenya, no matter how eminent those judges may be. Further, the unique and strong dissenting judgment of Lord Morris, a judge of the greatest eminence, cannot but cast some doubt on the correctness of the decision of the majority. I have carefully studied the decision of the majority and it appears to me that the Privy Council reversed the decision of this Court which was the subject of appeal for the following reasons. First, that s. 15 did not specify what consequences would follow a failure to comply with the mandatory provisions relating to attestation, therefore those consequences were to be ascertained by implication from the context in which the section appeared and from the general scheme of the Act. Secondly, it is a probable conclusion from the saving provisions of s. 21 that the invalidity of an unattested instrument is one limited to special purposes only, which purposes, it can be implied from s. 5, are for registration only as the affidavit of the attesting witness is necessary for registration. Thirdly, that by implication from ss. 13 and 14, which state that an unregistered instrument is void as against certain parties, together with the fact that s. 15 is in the context of a group of sections which are concerned with registration implies that the invalidity is limited to purposes of registration. Fourthly, that the New Zealand cases on the parent Act of the Kenya legislation show a uniform construction of the section to the effect that an unattested instrument is valid inter partes. Finally, that in consequence the unattested letters of hypothecation are valid as between the parties thereof.

I accept that there are a number of sections of this Act which it is not easy to construe, but I regret that I am unable to agree either with the reasoning or the conclusion of the Privy Council. As regards the New Zealand cases, I find it unnecessary to analyse them again as I have already done so in my judgment in the *Vallabhji* case (*supra*). It is indeed difficult to quadrature the statement of the Privy Council that the New Zealand decisions “show no inconsistency or

variance” with the actual decisions. As regards the importance placed by the Privy Council on s. 21, I find myself unable, in the light of the law which exists in Kenya and of which the Privy Council naturally had only a very limited knowledge, to attach to it the same paramount significance. Indeed, if s. 21 has the implied validating effect attributed to it by the Privy Council this effect would be general and not restricted to s. 15, with the result that the whole purpose of the Act would be undermined. I cannot construe a saving provision in such a way as, without reference to any particular provision saved, to confer on it the power of the tail which wagged the dog. As regards the other reasoning of the Privy Council, it seems to be based on a series of implications designed to arrive at a predetermined conclusion and is best exemplified by the following sentence in the judgment which appears at p. 192.

“If the implied invalidity of an unattested instrument is limited to purposes of registration this result (that is validity *inter partes*) is achieved.”

It seems to me that if the legislature had intended a limited invalidity to result from non-attestation nothing would have been easier than to say so, the more especially as it did precisely this in the two immediately preceding sections and in three of the succeeding sections. In the *Vallabhji* case (*supra*) I gave at length my reasons for coming to the conclusion that an unattested instrument was totally invalid. I consider it unnecessary to repeat my reasons as there is nothing in the decision of the Privy Council which in any way causes me to revise my views. I consider that the Privy Council has, by a subtlety of reasoning, reached a conclusion contrary to the plain meaning of a section of a Kenya Act. I cannot express my views on the true construction of s. 15 more clearly than by adopting the words of Lord Morris in his judgment at p. 197 where he said:

“In regard to s. 15 where there is a mandatory direction in a section dealing with the validity of instruments I consider that the provision as to attestation is a positive and obligatory one: failing obedience to it an instrument is not a valid instrument. That being so, it seems to me that in failing to have the instrument attested the Bank failed to secure a valid instrument.”

The final matter for consideration on the first issue is whether, having come to the conclusion that this Court is free to depart from the decision of the Privy Council and that such decision was wrong, this Court should now give a decision contrary to that given by the Privy Council. I have found this a matter of the very greatest difficulty. On the one hand it is urged that the Privy Council’s decision is a recent one and has not acquired the respect and following attributable to age; that it is unlikely that property rights have been acquired on the basis of the decision; and that it is the duty of this Court to rectify an erroneous decision. On the other hand it is urged that the decision, even if wrong, is not unreasonable; that it involves the construction of a section which, once determined by the final court of appeal, should be regarded as settled even if not capable of complete justification and that it should be left to the Legislature to rectify any misunderstanding of its intention; that it does not involve a matter relating to the common law or the doctrines of equity or the fundamental needs and customs of the people of Kenya, a decision on which may well change to meet changing needs; and that a reversal of a decision so recently given by the final Court of Appeal in the comparatively minor matter of the construction of a section will result in uncertainty, not only in this matter but in regard to other decisions of the Court of Appeal. With considerable hesitancy I have come to the conclusion that this Court should not give a decision in this appeal contrary to that given by the Privy Council. Had the matter involved any fundamental question of law or any matter relating to the common law or to equity I should have come to a contrary conclusion. But it involves only

the comparatively minor matter of the construction of a section and it will be borne in mind that the members of this Court stated that they arrived at their decision in the *Vallabhji* case (*supra*) with some reluctance. For a final court of appeal to reverse itself within three years on a comparatively minor matter of interpretation cannot but create uncertainty as to the effect of its decisions. I have no desire that a decision of this Court should, as was said by a famous judge about decisions of another court, fall into the category of a railway excursion ticket and be described as “good for this day and train only”.

For these reasons on the first issue I have come to the conclusion that this Court should not depart from the decision of the Privy Council that the letters of hypothecation are valid *inter partes*. I wish, however, to make it clear that such decision should not be taken as a guide to the results which should normally follow the failure to comply with the imperative provisions of a section.

As a substantial portion of the goods seized were acquired after the date of the last letter of hypothecation, which goods I shall refer to as future goods, even if the letters of hypothecation are valid the next issue is whether they apply to future goods. The trial judge in a very careful and full judgment examined the relevant clauses of the letters and came to the conclusion which he set out succinctly in the following words:

“Having examined the whole document, I have come to the conclusion that the letter of hypothecation was intended to cover all the goods of the plaintiff whether present or future.”

While the description of the goods at the end of each letter is by no means as clear as it should have been, I entirely agree with him. The goods hypothecated were:

“all goods of the description appended hereto in our ownership or disposition which are now in or shall from time to time hereafter be brought into the . . .” particular shop.

These words, in the clearest possible terms, refer to goods which were in the future to be brought into the shop. Mr. Gratiaen submits that these general words should be restricted to goods which were in the ownership of the plaintiff at the time the letters of hypothecation were signed but were not in the shop and which were subsequently brought into the shop. As the trial judge, in his analysis of the remaining clauses of the letters of hypothecation has pointed out, there is nothing in those clauses which required such a restricted construction. Indeed, the fact that the security is to be a continuing security for an uncertain time in the future in respect of a continuing overdraft, with the authority to the plaintiff to sell the hypothecated goods but the requirement that during the continuance of the security goods to a certain value were always to be kept in the shop, points irresistibly to the true construction of those words being given the widest possible sense and not in any way restricted.

The third issue is not, due I am sure to my own fault, as clear to me as it should be. It seems to fall into two parts, though to some extent I think the borderline between the two parts has been blurred in the arguments. The first part is the submission of Mr. Gratiaen that, in respect of the future goods seized, the Bank had no such sufficient interest as would preclude the plaintiff from withdrawing the licence to seize contained in the letters of hypothecation; and that, as it is agreed that such licence had been withdrawn before actual seizure, therefore the Bank had no power to seize those goods, with the result that it and the Transporters had committed a trespass and conversion in respect of the future goods. The second part is the submission that even if the plaintiff had committed a breach of contract in withdrawing his licence to the Bank to

seize the goods, whether existing or future, nevertheless the remedy for this breach of contract was an action in personam against the plaintiff, and that it was not open to the Bank to take the law into its own hands and seize by force – and it was suggested by excessive force – goods which belonged to the plaintiff and in respect of which the licence to seize had been withdrawn, even if the withdrawal was in breach of contract.

In coming to a conclusion on this issue, it must be appreciated that it is the rights of the parties inter se which are being considered and that there does not fall for consideration the effect of the acts of the parties on the rights of a third party. It is also necessary to consider the effect of these letters of hypothecation and the nature of the rights which arose under them. Hypothecation of goods, at least in the sense in which the letters of hypothecation were given, is a means of pledging the goods as security for a debt or demand without the pledgor parting with the possession of the goods. There is very little case law in England, and virtually none in East Africa, on the nature of the rights created by hypothecation, but it would seem that the Bank not infrequently makes use of this form of security. As regards goods in existence at the time of the hypothecation, since they are pledged as security an interest in rem must be created by the act of hypothecation; but as possession of the goods remains with the borrower, the lender does not by the mere act of hypothecation acquire any right to take possession of the goods nor any right to sell them, but merely a right by judicial proceedings to realise the value of the goods. If the lender seeks to obtain rights, such as a means of enforcement of the security without recourse to litigation, additional to the rights created by the act of hypothecation, then he must obtain those rights by agreement with the borrower. That is what the Bank did, as the letters of hypothecation, in addition to hypothecating the goods, gave to the Bank a means of enforcement without recourse to the courts by conferring upon the Bank a power of entry on the premises, a power of seizure of the goods, a power of sale of the seized goods and a power of applying the proceeds of sale towards satisfaction of the debt. These powers, in conjunction with the interest in rem created by the hypothecation, clearly confer, subject to the submissions on the second part of this issue, a right in respect of goods owned by the plaintiff at the time that the letters of hypothecation were executed to enter on the shop premises, seize the goods, sell them and apply the proceeds in reduction of the overdraft. The submission on the first part of this issue is that in respect of the future goods no interest in rem existed until some further act, such as seizure of the goods, had crystallised the inchoate interest in rem; that as there was no interest in rem it was open to the plaintiff to withdraw the licence to seize before seizure had crystallised the right in rem; that there had in fact been such withdrawal of the licence with the result that the act of seizure was a trespass; and that an interest in rem could not be founded on a trespass. It was emphasised that the letters of hypothecation gave to the plaintiff a right to sell the goods, which sale must be free of any interest in rem of the Bank in the goods, and that such a defeasible right in rem could not be created in respect of goods which were not at the time of the execution of the letters in the possession of the plaintiff and of which the contractual rights had not become crystallised into rights in rem. As the common law and doctrines of equity as they exist in Kenya relating to this matter have not been previously the subject of consideration, I shall seek in respect of both parts of this issue first to ascertain the position in England and then I shall determine whether the circumstances of Kenya and of the inhabitants thereof require any modification of such common law and doctrines of equity in their application to Kenya.

At law a person who contracts to transfer or pledge property which he does not at that time own does an act which is void. In equity, however, as it was

developed up to the end of the last century, if the property is sufficiently described, so as to remove any uncertainty should property subsequently be acquired by such person, and the contract is made for valuable consideration, the interest which is sought to be transferred or to be created by the pledge would, immediately on the acquisition of the property, be regarded as transferred or created without any further act on the part of either of the parties. The contract, however, must transfer or create an interest; if it merely confers a power which must be exercised before the interest is transferred or created, then until the power is exercised in respect of the subsequently acquired property no interest in rem is transferred or created by the contract. (See *Holroyd v. Marshall*, 11 E.R. 99 and *In re Lind*, [1915] 2 Ch. 345.) There are some dicta in *Collyer v. Isaacs* (1881), 19 Ch.D. 342 which were regarded in *In re Lind* (*supra*) as being to the contrary and as setting out that such a contract in respect of after acquired goods merely created a contractual right. *Collyer's* case was explained and distinguished in *In re Lind*, but I see nothing in either the decision or the dicta in *Collyer's* case which is contrary to the equitable doctrine set out in *Holroyd's* case and *Lind's* case, once it is appreciated that the *Collyer* case was dealing with the position at a moment of time before the subsequently acquired property was in fact acquired. Indeed, Jessel, M.R. said at p. 351 in the *Collyer* case (*supra*):

“A man can contract to assign property which is to come into existence in the future, and when it has come into existence equity, treating as done that which ought to be done, fastens upon that property and the contract to assign thus becomes a complete assignment. . . . When this is clearly understood, it follows that until the property comes into existence the contract remains only a contract by which the party entering into it will be bound. . . .”

I have already pointed out that by virtue of the hypothecation an interest in rem is created in the property pledged. The existence of a right in the pledgor to sell the goods makes no difference to the interest in rem created by the hypothecation, as that interest remains until it is the subject of defeasment by reason of the sale. (See *Lloyds Bank v. Bank of America*, [1938] 2 K.B. 147.) There is nothing in the circumstances of Kenya or of its inhabitants which would require any modification of the English equitable doctrines which I have set out above and, accordingly, I am satisfied that such is the position in equity in Kenya.

Applying the law as so set out to the facts of this case, the letters of hypothecation, which were given for valuable consideration, in hypothecating the specified goods to the Bank created immediately in the Bank an interest in rem in respect of the existing goods. As regards future goods, the description in the letters was sufficiently clear to avoid any uncertainty and immediately these goods were acquired by the plaintiff an interest in rem in them was created in favour of the Bank. This interest in rem in the goods arose notwithstanding the fact that there could be defeasment of the interest if the right to sell was exercised by the plaintiff. The existence in the letters of a power in the Bank to seize and sell the goods merely enabled the Bank to enforce, without recourse to the courts, the pre-existing interest created by the hypothecation. The exercise of these powers was in no way a pre-requisite to the creation of an interest in rem, either in respect of future goods or of existing goods. I am satisfied, therefore, that in respect of the future goods seized the Bank, had before seizure an interest in rem in the goods which precluded the plaintiff from withdrawing the licence to seize contained in the letters of hypothecation. The result is that in respect of both the future goods and the existing goods the Bank, when it exercised the power of seizure, was exercising a power given for valuable

consideration to enforce a pre-existing interest in rem in respect of the goods hypothecated.

The second part of this issue raises an important question of law. Basically the policy of the law is that a person should not himself seek to enforce his rights if such enforcement will be contrary to the will of the person against whom the rights are being enforced and will, as a result, involve the use of force. In general such rights should be enforced through the courts and the occasions upon which a person may take the law into his own hands to enforce his rights are very few indeed. (See *Hope v. Osborne*, [1913] 2 Ch. 349 and *Thompson v. Park*, [1944] 1 K.B. 408.) The common law of England has recognised certain exceptions to this general rule, for example, the abatement of private nuisance, the seizure of trespassing animals and distress, and the common law has long allowed the use of reasonable force in the protection of person or property. In each case, however, where the use of force is permitted only such force may be used as is reasonable in the circumstances (see *R. v. Milton*, 173 E.R. 1097); in the words of the old plea in justification of the use of force, the defendant might only molliter manus imposuit. Such is the common law of England and it has long also been recognised as the common law of Kenya.

Did the Bank have any sufficient interest in the seized goods which would entitle it to enter the plaintiff's shop and to use reasonable force in order to obtain possession of the goods? It is unnecessary to consider the powers of the Bank at common law as it acted under the licence contained in the letters of hypothecation. The law is that while certain licences create no interest in property and are revocable (see *Frith v. Frith*, [1906] A.C. 254) a licence coupled with an interest and intended to be used for the purpose of serving that interest is both irrevocable, in the sense that it cannot effectively be withdrawn unilaterally until the interest is served (see *Wood v. Leadbitter*, 153 E.R. 351; *Hurst v. Picture Theatres Ltd.*, [1915] 1 K.B. 1; and *Winter Garden Theatre v. Millennium Productions*, [1948] A.C. 173) and capable of personal enforcement so long as the force used is not excessive and would not lead to any major breach of the peace. In *Wood v. Manley*, 113 E.R. 325 a purchaser of hay with a licence to enter a farm and remove the hay was held entitled to break down the gates of the farm and take away the hay even though his licence to enter had purportedly been withdrawn before entry and the gates locked. In *Blades v. Higgs*, 142 E.R. 634 it was stated that there is no substantial distinction between forcibly repossessing property wrongly taken away and forcibly acquiring possession of property which possession is wrongly withheld. Thus, if a person has an interest in goods and a licence to enter premises and seize the goods in order to give effect to that interest, that person may exercise the licence and seize the goods even if this involves the use of force so long as the force used is reasonable and not excessive and does not result in a major breach of the peace.

In applying the law as I have set it out to the facts of this case, the licence of the bank to enter and seize the goods was a licence coupled with an interest, as it was a licence intended to give effect to the Bank's rights in rem in the hypothecated goods. Consequently it could not effectively be revoked by the plaintiff. The bank was entitled, subject always to no major breach of the peace being caused, to use force in order to seize the goods, notwithstanding that the plaintiff had purported to withdraw the licence and notwithstanding that the plaintiff resisted the entry and seizure, so long as only reasonable force which was not excessive in the circumstances was used. It is suggested that the Bank used excessive force, but the agreed facts do not cover this. As the Bank was entitled to use force, the onus in the circumstances of this case would be on the plaintiff to prove either by evidence or by agreed facts that the force used was excessive. This he has not done.

For these reasons I would dismiss the appeal. It is however agreed by the

parties that the preliminary decree requires some variation and I would order that the preliminary decree be varied accordingly. As I understand it the agreement is as follows:

- (1) That the judgement entered for the defendant on the counterclaim in the sum of Shs. 351,495/73 be set aside and in lieu thereof judgment be entered for the defendant only for the balance of the admitted amount of Shs. 351,495/73 after deduction therefrom of the sum realised on the sale of the goods seized and sold by the defendant and the sum realised by the defendant on account of the plaintiff in respect of bills and the collection thereof. The sum realised on the sale of the goods seized is to be ascertained by arbitration as agreed and to be in accordance with clause 10 of the letters of hypothecation.
- (2) That interest on the counterclaim be at the rate of 8 per cent per annum from 1 August 1962, until payment in full.
- (3) That the plaintiff be awarded interest on any special damages at court rates from the date of the filing of the suit until payment in full and on general damages from the date of assessment at court rates until payment in full.
- (4) That the costs in the High Court be certified as fit for Queen's Counsel and junior.

As, however, I am by no means certain that I have set out correctly the agreed variations, I would give liberty to the parties to apply to a single judge of this Court in order to make any variation in the above which is either agreed or which the single judge may think appropriate in order to give effect to this judgment.

The respondents will be entitled to the cost of the appeal with a certificate for two advocates.

As the other members of the Court agree it is ordered accordingly.

Duffus VP: The facts of this case and the various points for determination in this appeal have been fully stated in the judgment of my Lord President.

The first issue is on the rule of stare decisis. This Court is being asked to say that it is not bound by the principles of judicial precedent and should decline to follow a decision given by the Privy Council when that judicial body was the final Court of Appeal for Kenya. This Court is now the final Court of Appeal for the three sovereign states of Kenya, Tanzania and Uganda but, before the independence of these three countries and for varying periods after, the Privy Council was the final Court of Appeal and the Court of Appeal for East Africa was then a court inferior in each of these States to the Privy Council and bound by the principles of judicial precedent to follow the ratio decidendi of any decision of that judicial body.

The adherence to the principle of judicial precedent or stare decisis is of course of the utmost importance to the proper administration of justice in the courts in East Africa and thus to the conduct of the everyday affairs of its inhabitants, it provides a degree of certainty as to what is the law of the country and is a basis on which individuals can regulate their behaviour and transactions as between themselves and also with the State. There can be no doubt that the principle of judicial precedent must be strictly adhered to by the High Courts of each of the States and that these courts must regard themselves as bound by the decision of this court on any question of law, just as in the former days this Court was bound by a decision of the Privy Council, or in England as the Court of Appeal or the High Courts are bound by the decisions of the House of Lords, and of course, similarly the magistrates courts or any other inferior

court in each State are bound on questions of law by the decisions of this court and subject to these decisions also to the decisions of the High Court in the particular State.

This court has now been constituted by each of the three sovereign States as the final Court of Appeal and its decisions are no longer those given by an inferior court subject to review by the Privy Council. The former decisions of this Court on the question of stare decisis, and I refer here in particular to the decisions of this Court in *Kiriri Cotton Co. v. Dewani*, [1958] E.A. 239 and *Kabui v. R.* (1954), 21 E.A.C.A. 260 are not really applicable to this Court having regard to its present status as the ultimate Court of Appeal.

The present position of this Court in Kenya is analogous to that formerly occupied by the Privy Council in that it is the ultimate Court of Appeal in Kenya. The decision of the Privy Council that we are now asked to consider and over-rule is a decision of the Privy Council when it was still the final Court of Appeal for Kenya, in fact it was the last decision given by that distinguished body in this capacity. In this respect therefore that decision would be in the same position as a decision now given by this court so that the real question is to what extent will this court, as the ultimate Court of Appeal for Kenya, re-consider and if necessary over-rule a previous decision given by this Court with its present status, or by the Privy Council when it was the ultimate Court of Appeal for Kenya. There is, of course, a distinction between decisions of this Court now and decisions given when it was a subordinate Court of Appeal but for all practical purposes these decisions can be considered together as the decision of this court was always binding in Kenya unless over-ruled by the Privy Council.

We have had the benefit of full arguments on this important question by the learned advocates for the parties, Mr. Gratiaen, Q.C., for the appellants and Mr. Mackie-Robertson, Q.C., for the respondents, and my Lord the President has fully dealt in his judgment with the benefits and disadvantages of the application of the principle of judicial precedent. As the President points out the Privy Council, when it was the final Court of Appeal for Kenya, never regarded itself as bound by its own previous decisions as did the House of Lords in England. Even the House of Lords in England has now relaxed that rule and by its Practice Statement of 26 July 1966 [1966] 1 W.L.R. 1234 stated that their Lordships propose to modify that rule and, whilst treating former decisions of the House as normally binding, to depart from a previous decision when it appears right to do so. I entirely agree with my Lord President that this Court must as the ultimate Court of Appeal have a similar power to that formerly exercised by the Privy Council when it was the final Court of Appeal for Kenya. The duty of this Court in Kenya is to decide any case coming before it according to the laws of Kenya and this Court may be unable to do so if it is bound to follow a previous decision, which is clearly contrary to law and which this court feels that it would be wrong to follow, and the court must, therefore, as the ultimate Court of Appeal be able to depart from a previous decision when it appears right to do so. I entirely agree with the judgment of my Lord President when he sets out the principle on which this Court will act when he states as follows:

“For these reasons I am satisfied that as a matter of judicial policy this Court, as the final Court of Appeal for Kenya, Tanzania and Uganda, while it would normally regard a previous decision of its own as binding, should be free in both civil and criminal cases to depart from such a previous decision when it appears right to do so. It will, of course, exercise this power only after careful consideration of the consequences of doing so and the circumstances of the particular case, but I would not seek to lay down

any more detailed guide to the circumstances in which such a departure should take place as the matter would be best left to the discretion of the Court at the time it was up for consideration.”

I will now consider the decision of the Privy Council which this Court has been asked to reconsider. This decision concerns the interpretation of s. 15 of the Chattels Transfer Act (Cap. 28) and the simple question whether the non-attestation of an instrument under that Act made the instrument invalid inter partes. I was a member of the Court of Appeal whose judgment was reversed by the Privy Council decision and after fully reconsidering the matter and especially the judgments of the Privy Council, it still seems to me with great respect to the majority judgment of the Privy Council that the provisions of s. 15 are explicit and that attestation was mandatory and necessary for the instrument to be valid and that, therefore, the instrument in that case was as between the parties invalid. I do, however, appreciate the reasoning of the majority judgment of the Board as delivered by Lord Pearson. The interpretation of this section is one of those difficult and intricate legal questions that do arise from time to time where there can be and are different but perfectly reasonable views expressed by the various members of the judiciary who have had to deal with the matter and the answer must be that the correct interpretation is the interpretation given by the tribunal which has the final say, that is by the ultimate Court of Appeal. It follows that in this instance the correct interpretation of the meaning of s. 15 is that given by majority decision of the Privy Council. This case is indeed a good example of the benefits of the rule of stare decisis and of the confusion and possible injustice that can follow by not applying this rule. Section 15 is, on the face of it perfectly simple and straight-forward but yet it is a section which is capable of and has indeed produced different interpretations, and if the rule of stare decisis is not applied then the commercial community of Kenya will within a comparatively short period have had first to follow the interpretation laid down by the High Courts of Kenya and by the Court of Appeal in Kenya, and then that laid down by the Privy Council completely reversing the previous interpretation given by the courts of Kenya and now, if at any rate, the majority views of this Court were applied, there would be yet another complete reversal of interpretation. This could only lead to complete uncertainty and a lack of all confidence in the law and in the courts and would also be likely to cause injustice to parties who have entered into contracts on the basis that the interpretation given to s. 15 by the Privy Council was final and conclusive. I am, therefore, definitely of the view that this is a case in which this Court should apply the principle of judicial precedent and hold that the interpretation given by the Privy Council to s. 15 was final and conclusive and that this interpretation should be followed by this Court.

The second question was whether the letters of hypothecation covered future goods. The trial judge dealt with this matter very fully and I agree with his conclusion on this issue.

In the present trial before Chanan Singh, J. the parties agreed on all the issues and facts, and the third issue was stated as follows:

“(3) Even if the first and second issues are answered in favour of the defendant, did the forcible seizure and subsequent sale of the goods constitute a tort?

It is agreed that goods were forcibly seized against the will of the plaintiff who had withdrawn or purported to withdraw the leave and licence (if applicable) granted by letters of hypothecation.”

In his judgment the trial judge held:

“There is no evidence before me suggesting, let alone proving, that the

force used by the Bank was more than was necessary to seize the goods and I am unable to hold that the forcible seizure and subsequent sale of the goods constituted a tort”.

The judge made a definite finding here but later in his judgment he further said:

“Even if it be conceded that the plaintiff was entitled to withdraw the leave or licence he had himself given for a consideration, he could do that only while the obligation remained barely contractual. Once the bank had entered and taken possession of the goods, no amount of notice that the plaintiff made could have the effect of withdrawing the leave or licence. The bank’s contractual right had now been converted into a beneficial interest. Even if the plaintiff cancelled the bank’s licence to enter his shop and store at this stage, he was bound to give it a reasonable time to remove the goods.”

With respect to the judge these views do not appear to have any relevance to this case as on the agreed facts that I set out the plaintiff had withdrawn the leave or licence granted to seize the goods before the goods were seized. The real issue is whether the defendants were entitled to seize the goods notwithstanding the withdrawal of the plaintiff’s licence.

The dispute in this case is purely between the parties to the agreement and there is no question as to the rights of any third party. The 2nd defendants – Peck & Barber – were acting as agents for the defendant bank in carrying out the seizure of the goods hypothecated.

In my view, the issue as to whether or not the plaintiff could have withdrawn the first defendant’s licence must entirely depend on the construction of the contracts both parties entered into as set out in the various letters of hypothecation duly exhibited. I entirely agree with the trial judge that these licences were granted for valuable consideration but the question as to whether the licence could be revoked or cancelled must depend on the agreement arrived at between the parties. This question was fully considered by the House of Lords in England in the case of the *Winter Garden Theatre (London) Ltd. v. Millenium Productions Ltd.*, [1948] A.C. 173 at p. 203, and in the opening paragraph of his judgment Lord MacDermott very clearly expressed what, in my opinion, must be the criterion in this case, he said:

“My Lords, the first question in this appeal is whether the licence granted by the appellants was, according to the contract creating it, revocable when the present dispute arose. The answer depends, in my view, solely, on the true construction of the letters of 10 June 1942, as ascertained in conformity with the ordinary principles applicable to the interpretation of written instruments.”

I would also like here to refer to the following extract from Salmond on Tort (13th Edn.) at p. 217, which in my view concisely sets out the present position of the law both in England, and by virtue of the law of Contract Cap. 23 in Kenya:

“It seems, therefore, that the former rule of law that a licence is revocable despite any contract has been converted into a rule of construction that a licence is prima facie revocable but subject to the terms of any contract between the parties. The extent to which the licensor has disabled himself from exercising his power of revocation will have to be ascertained according to the ordinary principles of construction.”

The rights of the defendant bank to enter, seize and sell the hypothecated goods are clearly set out in paras. 8, 9 and 10 of the three letters of hypothecation

which contain all the terms of the contract entered into between the parties. I can find no difficulties of interpretation in these three contracts. It was definitely the intention of the parties that the bank should have the right to enter and seize these goods so long as the plaintiffs continued to be indebted to the bank. At the relevant time in this case, it appears that the plaintiff had and still had the use of the bank's money to the extent of some Shs. 351,495/- the amount for which judgment was entered for the bank in the counterclaim.

Like the trial judge and with respect to the advocates for the plaintiff/appellant, I find the argument that the debtor could in these circumstances suddenly withdraw the rights of the bank to enter and seize the goods hypothecated quite untenable. A question was raised on appeal as to whether the defendants had used excessive force, but there is no evidence to support this. The agreed facts are that the goods were forcibly seized, in that this was done against the plaintiff's will, but not that excessive force was used.

I agree therefore with my Lord President that this appeal be dismissed and I agree with the order that he has set out in his judgment.

Law JA: I have had the advantage of reading in draft the judgments prepared by the learned President and Vice-President. I agree with their conclusions generally, and would only add a few observations relating to the first issue in this appeal, which involves consideration of the extent to which this Court, as the final court of appeal for the East African States, will apply the principle of stare decisis.

The first ground of appeal is directed against the first issue in the court below, and is worded as follows:

"The letters of hypothecation are invalid, void and ineffective even inter partes for non-attestation as required by s. 15 of the Chattels Transfer Act."

For this ground to succeed, this Court would have to depart from the majority judgment of the Privy Council in *National & Grindlays Bank Ltd. v. Dharamshi Vallabhji and Others*, [1966] E.A. 186. Two questions arise in this connection. Firstly, should this Court, as a final court of appeal, consider itself bound by decisions of the Privy Council pronounced when it was the final court of appeal to which this Court was subordinate, and by this Court's own previous decisions, now that this Court is the final court of appeal; and secondly, if this Court does not consider itself so bound, should it in the peculiar circumstances of this case depart from the decision of the Privy Council in *Dharamshi's* case. The attitude of this Court in relation to stare decisis has been the subject of consideration on several occasions, but not so far as I am aware since appeals from Kenya to the Privy Council were abolished. In *Poole v. R.*, [1960] E.A. 62, Sir Alistair Forbes, V.-P. delivering the judgment of the Court said:

"This Court adheres to the principle of stare decisis"

with the qualification that in criminal matters it is not bound to follow an earlier decision which it considers to be erroneous if to do so would involve supporting an improper conviction. In *Kiriri Cotton Co. Ltd. v. Ranchoddas Keshavji Dewani*, [1958] E.A. 239, Sir Kenneth O'Connor, P. with the concurrence of the other members of the Court, held, following *Young v. Bristol Aeroplane Co. Ltd.*, [1944] K.B. 718, that the principle of stare decisis is followed by this Court, subject to the following qualifications:

- (1) that the court is entitled and bound to decide which of two conflicting decisions of its own it will follow;
- (2) that this court would be bound to refuse to follow a decision of its own

which, though not expressly overruled, cannot stand with a decision of the Privy Council or of the House of Lords; and

- (3) this court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam.

Mr. Mackie-Robertson for the bank has urged that the same principles should so far as is practicable continue to be applied by this court, and that there should be no departure from stare decisis except in the clearest case. He has stressed the importance of certainty and finality in the law in the circumstances obtaining in a developing country such as Kenya, and the need for consistency and regard for precedent which are so necessary for the orderly development of the rule of law.

Mr. Gratiaen for the appellant submitted that the position has changed since this court became a final court of appeal, and that it should have the same power to depart from previous erroneous decisions of its own or of the Privy Council, a power which the Privy Council has always reserved to itself, and he urged that when it is prudent and proper to do so, it is the duty of this court to exercise what he described as its undoubted and implicit right not to be fettered by stare decisis, so as not to be tied to the acceptance of past decisions which are obviously wrong. Mr. Gratiaen drew our attention to the position adopted by the courts in South Africa when that country abolished appeals to the Privy Council. It was there held, in *John Bell v. Esselen* (1954), (1) S.A.L.R. 147, that as the Supreme Court's Appellate Division had become the final court of appeal, it had the power which the Privy Council had of departing from an erroneous decision of the Privy Council.

I am content to follow the dictum in *Poole's case* (*supra*) in relation to criminal matters, that this Court will normally adhere to stare decisis, but not to the extent of following a previous decision which it considers to be erroneous if to do so would involve supporting an improper conviction. As regards civil matters, whilst conscious of the importance of the use of precedent, I do not think this Court should deprive itself of the right to depart from previous decisions of its own or of the Privy Council which it considers to be wrong, such a power being exercised only in exceptional cases, and having regard to the words of Lord Gardiner, L.C. in the Practice Statement set out in [1966] 1 W.L.R. at p. 1234, that in this connection the judges of a final court of appeal:

"... will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into. . . ."

Like the learned Vice-President, I think that the position of this Court in relation to stare decisis should be in accordance with the principles set out by the learned President in the following extract from his judgment:

"For these reasons I am satisfied that as a matter of judicial policy of this Court, as the final Court of Appeal for Kenya, Tanzania and Uganda, while it would normally regard a previous decision of its own as binding, should be free in both civil and criminal cases to depart from such a previous decision when it appears right to do so. It will, of course, exercise this power only after careful consideration of the consequences of doing so and the circumstances of the particular case, but I would not seek to lay down any more detailed guide to the circumstances in which such a departure should take place as the matter would be best left to the discretion of the Court at the time it was up for consideration."

I consider, therefore, that this Court has the power, if it thinks fit, to depart from the decision of the majority of the Board in *Dharamshi's case*. The

question now arises, would it be right to do so? On the one hand, it is a fact that the unanimous consensus of judicial opinion in Kenya, both in the High Court and this Court, is that an unattested letter of hypothecation is void absolutely and even against the parties, a view which is supported by the high authority of Lord Morris' dissenting judgment in the *Dharamshi* case. On the other hand, there is the majority judgment in that case, which is entitled to great respect, of Lords Pearson and Pearce, to the effect that such an unattested instrument is valid between the parties, but incapable of registration and so ineffective against third parties. To suggest that this majority view was arrived at per incuriam is out of the question; it was arrived at after a detailed analysis of the relevant legislation. Although it can be forcefully argued that this majority view is wrong in law, it is a reasonable view based on the interpretation of a statute. It is to some extent supported by New Zealand decisions based on a similar statutory provision which was the source of the Kenya Act. Mr. Gratiaen has submitted that Lords Pearson and Pearce misdirected themselves in holding, as they did, that the New Zealand decisions were consistent. I must confess to having had some difficulty in reconciling them. The fact remains that in the last of these decisions, *Lee v. Parke's Official Assignee in Bankruptcy* (1903), 22 N.Z.L.R. 747, Denniston, J. held that an unattested instrument remained valid between the parties, although incapable of registration under the Act and therefore incapable of conferring rights against third parties. This decision has held the field in New Zealand for two-thirds of a century, and if it does not correctly interpret the legislation, the legislature in New Zealand has had ample opportunity to correct that judicial error had it thought fit to do so. The majority judgment in *Dharamshi's* case represents a logical and reasonable view which has formed part of the law of Kenya for the past three years. I can see no compelling reason for departing from that decision and in my opinion the first ground of appeal fails.

As regards the other grounds of appeal, I agree with the conclusions arrived at by my learned brethren and could not usefully add anything. In my opinion, this appeal fails, and I agree with the order proposed.

Appeal dismissed.

For the appellant:

E. P. N. Gratiaen, Q.C., S. C. Gautama and R. R. Shah (instructed by *Shah & Shah*, Nairobi)

For the respondent:

J. A. Mackie-Robertson, Q.C., and J. N. Desai (instructed by *Hamilton Harrison & Mathews*, Nairobi)

The Commissioner-General of Income Tax v Robson and another [1970] 1 EA 213 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	19 December 1969
Case Number:	10/1969 (167/69)
Before:	Sir Charles Newbold P, Duffus VP, and Spry JA
Sourced by:	LawAfrica
Appeal from:	The High Court of Kenya – Harris, J

[1] Income Tax – Deduction – Expenditure – Partner in firm of advocates giving guarantees as director of client company – Partner required to pay shortfall – Money paid by firm – Partner and firm to be remunerated by fees, flat charge and percentage of profits – Whether amounts paid out deductible as expenditure incurred in production of income – East African Income Tax (Management) Act 1958, s. 14.

[2] Income Tax – Deduction – Guarantee – Director of company making payment under guarantee given by him for debt of company – Whether capital or revenue loss – East African Income Tax (Management) Act 1958, s. 15.

[3] Income Tax – Expenditure of a revenue nature – Payment under guarantees given by director of company – Whether capital or revenue loss – East African Income Tax (Management) Act 1958, s. 15.

Editor's Summary

The two respondents were advocates practising in partnership in Nairobi principally in commercial, conveyancing and general law. Both respondents were directors of various companies and their remuneration as such was paid into their firm. The firm was employed to form a film company, of which the first respondent was made a director, and in which he personally invested some money. An overdraft was obtained for the company from a bank on the security of a personal guarantee given to the bank by the first respondent which was, however, regarded as a liability of the firm. Other funds were raised for the company from clients of the firm on guarantees formal and informal given by the first respondent for repayment. These funds were paid to the company through the client account of the firm. The first respondent and the firm were to be remunerated by the company for services rendered to it partly by professional fees for specific work; partly by a charge per film completed by the company to cover day to day legal advice and all other work done by the first respondent in the offices of the firm or at board meetings of the company; and partly by a percentage of the gross profits of the company. The company went into liquidation, and the first respondent was called upon to pay, and the firm in fact paid, a total of K.£8,000 under the various guarantees given by the first respondent to the bank and others. This amount was written off in the firm's accounts as a bad debt and the respondents claimed, in arriving at their total income for the relevant years of income, to deduct it as expenditure wholly and exclusively incurred in the production of income under s. 14 (1) of the East African Income Tax (Management) Act 1958. The Commissioner of Income Tax, relying on s. 15 of that Act, disallowed the deduction. Against this decision of the Commissioner the respondents brought this appeal.

On appeal by the Commissioner of Income Tax to the High Court ([1968] E.A. 415) it was held that advocates are required to give undertakings binding on them personally for the payment of money, and this is not moneylending; that remuneration by a percentage of profits is not inconsistent with the work being within the professional activity of an advocate; that the payments were

in discharge of undertakings given or obligations incurred in the ordinary course of the business of an advocate; and that the amounts were not capital losses. The Commissioner-General of Income Tax appealed on the grounds that the losses were not incurred wholly and exclusively in the production of the respondent's income, and that they were losses of a capital nature.

Held –

- (i) (by Sir Charles Newbold, P.; and Duffus, V.-P.; Spry, J.A. dissenting) the losses were not incurred in the production of the respondent's professional income and were therefore not allowable as deductions;
- (ii) (obiter) (by Sir Charles Newbold, P.; Spry, J.A. contra; and Duffus, V.-P. not deciding) the losses were capital losses and therefore not allowable under s. 15 East African Income Tax (Management) Act 1958.

Appeal allowed.

Cases referred to in judgment:

- (1) *Morley v. Lawford & Co.* (1928), 14 T.C. 229.
- (2) *Commissioners of Inland Revenue v. Hagart and Burn-Murdoch* (1929), 14 T.C. 433.
- (3) *Jennings v. Barfield and Barfield*, [1962] 2 All E.R. 957; [1962] 1 W.L.R. 997; 40 T.C. 365.
- (4) *Commissioner of Income Tax v. Overland Co. Ltd.*, 3 E.A.T.C. 307; [1961] E.A. 729.

The following considered judgments were read:

Judgment

Spry JA: The respondents are advocates practising in partnership under the firm name of Robson, Harris & Co. Each claimed to be entitled, in the assessment of his income for the years 1962, 1963 and 1954, to the deduction of his share of certain losses. The Commissioner-General of Income Tax refused to allow the deductions and appeals to the Local Committee were dismissed. The respondents then appealed to the High Court, this time successfully, and the present appeals are brought by the Commissioner-General against the decision of the High Court.

The facts are as follows. In or about 1955, the firm of Robson, Harris & Co. were concerned in the incorporation of a company known as Phoenix Productions Ltd. and they continued to act for the company thereafter. The business of the company was the making of motion pictures. Mr. B. J. Robson, who acted in the matter, was asked, and agreed, to be a director and he was allotted two shares. He received no director's fee, as such. A basis of remuneration was agreed, but unfortunately the record does not show whether this was agreed from the start or at some later time. Mr. Robson was to receive the usual professional fees for specific work; he was to receive a fixed fee of £1,000 for each film made by the company, and he was to receive 3 1/2 per cent of the gross profits of the company. The fixed fee was to cover all work of a general nature, including office work and day to day legal advice on the board of directors. The percentage was for "outside work": the record does not explain what this means. These fees and the percentage were to be received by Mr. Robson for the firm of Robson, Harris & Co.

Mr. Robson had also another relationship with the company. At the time of promotion he had advanced the sum of £10,000. It should perhaps be explained that the company had only a nominal capital of £100 and operated

entirely on loan capital. This loan was to carry no interest, but was to entitle Mr. Robson to an eventual 3 1/3 per cent of the nett profits of the company. Mr. Robson stressed that this loan was made from his own, private, resources, not from funds belonging to the firm.

In November 1956, the company required money and Mr. Robson guaranteed a bank overdraft. He said that this was only expected to be a temporary loan. Later, he negotiated loans by certain of his clients to the company and these also he guaranteed. He gave these guarantees personally, but as between himself and his partners (a Mr. Harris was at that time also a partner), they were partnership obligations. Eventually, the company went into liquidation and proved unable to pay its debts in full and the firm paid the deficiencies to the creditors to whom Mr. Robson had given guarantees. It is the amounts paid under the guarantees that the respondents claim to be entitled to deduct from their profits for the relevant years as losses incurred in their business. No claim is made in respect of the loan of £10,000.

The trial judge held that the losses were incurred by Mr. Robson purely as an advocate in the course of his practice; that they were properly deductible under s. 14 (1) of the East African Income Tax (Management) Act 1958 and that such deduction was not precluded by s. 15 of the Act.

Mr. Muli, for the Commissioner-General, argued five grounds of appeal, but they were based on two propositions: first, that the losses were not incurred “wholly and exclusively” in the production of the respondents’ income, and, secondly, that they were losses of a capital and not a revenue nature.

As regards the first of these propositions, Mr. Muli’s argument was that Mr. Robson had a dual relationship with the company, as an advocate and as an investor, and he submitted that these activities were quite distinct. I think there was such a dual relationship, indeed I think Mr. Wilkinson conceded as much, but I find considerable difficulty in deciding where the demarcating line should be drawn.

Mr. Muli submitted that although, over the incorporation of the company, Mr. Robson had acted as an advocate, thereafter he should be regarded as an investor. He pointed out that Mr. Robson was not only a director but was also appointed as an “executive producer”. The record does not show what powers this conferred or what duties it entailed but Mr. Robson said that it carried no remuneration and for this reason the judge considered this appointment of no significance. Mr. Muli referred to the fact that Mr. Robson was a director and a shareholder in the company, but, with respect, I can see no significance in this: I accept that it is common and proper for advocates acting in the incorporation of a company to accept appointment as directors and to subscribe for or to be allotted a nominal share-holding; indeed, this is often essential to qualify them for holding office where they are invited to become directors. Mr. Muli also submitted that the soliciting of loans was outside the duties of an advocate and must have been done in Mr. Robson’s capacity as an investor in or executive of the company: again, with respect, I cannot agree. There is nothing unusual about an advocate negotiating a loan between clients.

I do not think the fact that Mr. Robson was personally an investor in the company affects the position, because we are only concerned with the profits and losses of the firm and there was evidence, which the judge accepted, that the guarantees were effected on behalf of the firm. It has never been suggested that in giving the guarantees Mr. Robson was allowing his private interest as an investor to prevail over his professional duties as a member of the firm. I do not therefore think that the private interest affects the question whether the guarantees were given by the firm “wholly and exclusively” in the production of its income.

The factor which is certainly unusual is the agreement for remuneration in respect of “outside work” by a percentage of gross profits, as Mr. Robson himself conceded in his evidence. I am not aware of, nor has it been suggested that there is, any rule of law or practice which precludes an advocate from entering into such an agreement but the existence of such an agreement might constitute evidence that the relationship between the parties went beyond that of advocate and client. On the other hand, this profit-sharing agreement did not put members of the firm in a position comparable with that of shareholders, because if for any reason Mr. Robson ceased to be the company’s advocate, the right to a share of profits ceased, except possibly as regards profits already realized. On balance, and not without some hesitation, I have come to the conclusion that the agreement for a percentage of profits was, as it purported to be, an unusual arrangement for professional remuneration, not a form of investment.

As regards the guarantees themselves, Mr. Muli argued that to be a legitimate deduction, expenditure must be directly for the production of income and as a general proposition I think that is undoubtedly correct. He submitted that the loans which were guaranteed were for the purpose of producing income for the company, not for Robson, Harris & Co. Therefore, he argued, the losses were only indirectly for the purpose of producing income for the firm. I am, with respect, not persuaded by this argument, which appears to treat the loans and the guarantees as being the same. Certainly the loans were for the benefit of the company and the guarantees, without which the loans would not have come into being, therefore directly benefited the company. But the question with which we are concerned is why Mr. Robson gave the guarantees. His own explanation was that it was “to obtain professional advantage of earning remuneration for my firm” and that explanation was clearly accepted by the judge.

The judge held that the giving of such guarantees

“was within the ambit of the general overall pattern of practice to be found among those advocates in Nairobi whose range of professional activities includes a considerable volume of company and conveyancing work, into which somewhat special category the appellants’ firm manifestly falls.”

He held that it was immaterial that such advocates may form only a comparatively small section of the profession.

One of the grounds of appeal was that the finding that the guarantees were made in the ordinary course of the appellants’ activities as advocates was a misdirection, although Mr. Muli only addressed us briefly in support of it.

Mr. Wilkinson argued that the respondents’ case does not depend on the question whether or not the giving of guarantees is one of the functions of an advocate. He submitted that an advocate may (apart from questions of professional ethics) have another business and that in such a case the profits and losses from the two activities will be aggregated for tax purposes. He submitted that the essential question here is not whether advocates make a practice of giving guarantees but whether the firm of Robson, Harris & Co. made such a practice.

It is true that the evidence of Mr. Robson does indicate that, at least for a time, he was giving guarantees for substantial sums. At the same time, I cannot, with respect, accept Mr. Wilkinson’s argument, for this reason, that Mr. Robson expressly said that he received no remuneration for the giving of the guarantees with which we are concerned. There is no evidence whether or not he received remuneration for other guarantees. In these circumstances, it seems to me that the giving of gratuitous guarantees for the company must either be regarded

as part of Mr. Robson's professional activities as an advocate or it does not form part of any business or profession at all.

Mr. Wilkinson further argued that the acceptance of directorships is normal for advocates as a means of earning fees for services which are largely, though not necessarily exclusively, legal. The guaranteeing of loans, particularly bank overdrafts, by directors is normal because banks will often refuse overdraft facilities unless such guarantees are given. In the case of a newly formed company, and particularly where other directors are non-resident, a bank will tend to prefer the guarantee of an advocate director, who will generally be better known to them. Mr. Wilkinson did not go so far as to submit that the giving of guarantees is necessary to advocates as part of their practice but he did submit that it was sometimes commercially expedient.

The judge considered at some length three British cases. The first of these in time was *Morley v. Lawford & Co.* (1928), 14 T.C. 229. This was a case where a loss on a guarantee given by a firm of contractors expressly for the purpose of obtaining a contract was held to be a legitimate deduction. As the judge said, while the case lends some support to the respondents' argument, it is by no means on all fours with the present case.

The second was *Commissioners of Inland Revenue v. Hagart and Burn-Murdoch* (1929), 14 T.C. 433. In that case it was held by the House of Lords that losses incurred by writers to the signet on unsecured loans to clients were not deductible. Although much of the reasoning in that case is relevant, it is clearly distinguishable from the present case, because it was admitted and found that the making of loans was not an ordinary incident of legal business. In the present case, there is a finding of fact by the judge that the giving of guarantees is within the "pattern of practice" of a class of local advocates who deal largely with company and conveyancing work.

The third case which was considered was *Jennings v. Barfield & Barfield*, [1962] 2 All E.R. 959. There the facts were almost on all fours with the present case and a Divisional Court held, distinguishing *Hagart's* case, that the losses were deductible. It may be noted that in that case the guarantee was given partly to enable certain transactions to be completed and partly to enable the borrowers to carry on their business. In the present case, of course, the guarantees were entirely to enable the company to carry on its business.

I have no doubt that the giving of guarantees is a normal part of the practice of an advocate, where those guarantees relate to matters in which the advocate is acting professionally, as for example in conveyancing transactions, and I have no doubt that any sums paid in discharge of such obligations would be legitimate deductions for purposes of income tax. The real question in the present case is whether the guarantees given were so remote from the respondents' legal practice as to come into a different category. I think this is a border-line case but after anxious consideration I am not prepared to differ from the judge. I would therefore hold that the first ground of appeal fails.

Mr. Muli's second line of argument was that the losses were of a capital nature. Apart from his substantive argument, he submitted that the judge had erred in law and in fact when he held that:

"an enquiry as to whether, now that they have proved irrecoverable, they constitute a revenue or a capital loss does not provide an apt criterion by which to determine the issue in this case."

This passage in the judgment, which is in fact taken almost verbatim from *Hagart's* case, would at first sight seem a misdirection, having regard to the provisions of s. 15 of the Act. I am, however, satisfied, reading the passage in

its context, that the judge meant no more than that the way in which the money was raised to pay off the guarantees was immaterial, and that is, I think, undoubtedly correct.

Mr. Muli relied, for his submission that the losses were capital losses, very much on the argument that these were “once for all” payments. They were not recurring payments: a single payment relieved the respondents of their obligations under the guarantee. With respect, I think that is a misconception of the “once for all” notion. According to the evidence, Mr. Robson had given guarantees in various matters and the payment he made honouring the guarantees given on behalf of the company only discharged those particular guarantees. In the same way, a payment by a merchant for a special consignment of goods might be described as a once for all payment, but that is not the sense in which the words are used in deciding whether a payment is of a capital or revenue nature. I think the better test in the present case is whether the payment was to acquire a capital asset (see *Commissioner of Income Tax v. Overland Co. Ltd.* 3 E.A.T.C. 307). In my view, it was not: on the evidence which the judge accepted, it would appear that neither by giving the guarantees nor by honouring them did Mr. Robson acquire or intend to acquire anything that could conceivably be regarded as a capital asset or that would, of itself, be productive of income. I would reject this ground of appeal.

For these reasons, I would dismiss the appeal.

Sir Charles Newbold P: This is an appeal by the Commissioner-General of Income Tax against a decision of the High Court allowing with costs two appeals, which were heard together, of the two partners of a firm of advocates against assessments of income tax on those two advocates in respect of the years of income 1962, 1963 and 1964. The detailed facts are set out in the judgment of Spry, J.A. and save in one respect I consider it unnecessary to restate the facts in detail. Basically the issue is whether sums expended by such advocates in order to meet guarantees given in respect of the business of a client by one of the advocates on behalf of the firm are deductible under s. 14 of the East African Income Tax (Management) Act as being “expenditure wholly and exclusively incurred by him in the production of “the income of the partners”. Harris, J. held that they were and that the sums so expended were not capital expenditure within s. 15 of that Act.

In outline the facts are that the firm of advocates acted professionally for a company whose business was the production of films. One of the partners, for all practical purposes, dealt exclusively with the company on behalf of the firm. I shall refer to him as the advocate, but his activities were activities undertaken on behalf of the firm. For those activities he received remuneration in three forms. First, fees for specific legal work; secondly, a flat sum of £1,000 for each film produced; and thirdly, 3 1/2 per cent of the gross profits of the company. The activities performed by the advocate were, first, specific legal work, such as the incorporation of the company, conveyancing, and legal advice on specific matters; and it was in respect of this work that the professional fees were paid. Secondly, general advice of a legal or lego-commercial nature on a day to day basis; and for this purpose the advocate was appointed a member of the board of directors and received a flat fee of £1,000 per film produced. There is no dispute in relation to these two types of activity and the remuneration therefor. Clearly these activities fall within the ambit of the professional activities of a firm of advocates with a commercial practice. It is to be noted that in his evidence in chief the advocate referred only to these two methods of remuneration. It was only in cross-examination that it came out that the advocate also became entitled at some later stage to receive 3 1/2 per cent of the gross profits of the company, but at no time was it clear for what reason this

percentage was payable. At some later stage also when the affairs of the company were not going well, the advocate was appointed executive producer, a post which, in the absence of any explanation, I understand to carry the responsibility for the actual working production of the films. Such a post has nothing whatsoever to do with the practice of the law. In the advocate's evidence it is clear that "after a time", when things were not going satisfactorily and more money was required by the company, the advocate guaranteed to the bank the repayment of an overdraft granted to the company for an appreciable sum and also guaranteed repayment of loans made by other persons to the company. As was pointed out during the argument, it is common form for the bank to require one or more of the directors of a company to guarantee an overdraft given to the company. It is I think clear beyond doubt that as the affairs of the company became more difficult, so the advocate became more and more involved in the business of the company, an involvement which went far beyond the proper limits of professional work. I am satisfied that it was in respect of this involvement that the advocate became entitled to 3 1/2 per cent of the gross profits, though that remuneration may not have been related to any particular activity. In effect the advocate had a dual relationship with the company; first, as an advocate and, secondly, as a person who was carrying on a joint enterprise with the company in the production of films. In the end the company failed and the advocate had to meet the amount due under the guarantees. It is these payments which he claims to deduct as expenditure wholly and exclusively incurred in the production of the income of the firm of advocates. I have no doubt that he cannot deduct these sums for two reasons.

First, the giving of a guarantee so as to enable the commercial operations of a client to continue may often be done by some advocates, but it is not an essential, nor a necessary, nor an ordinary part of their profession or the practice of the law. In my view it forms no part whatever of their professional activities. As it forms no part of their professional activity any loss incurred thereby cannot be a loss which was incurred in the production of the professional income. The giving of a guarantee for such a purpose is quite different from the position which arises where money is advanced, or an undertaking is given, by an advocate for the payment of such which have to be paid in the course of the professional work of an advocate, examples of which are the undertakings in connection with the purchase price of property being transferred or disbursements in connection with litigation. The giving of the guarantees in this case had nothing to do with the practice of the law – they were given because the advocate was a director of the company; and they would have been given whether the director was an advocate, an accountant, an engineer, a farmer or a plain business man. The advocate may have become a director because he was an advocate, but that does not make his activities as a director the activities of an advocate. I am satisfied that the amount expended in meeting the guarantees was in no sense expenditure wholly and exclusively incurred in the production of the professional income of the firm of advocates. Mr. Wilkinson sought to argue that in any event it was money expended in the business of giving guarantees. The case was never presented to the Commissioner-General, nor argued before the trial judge, on this basis and there is no evidence that the advocate was in the business of giving guarantees. I do not accept that it is open to the advocate at this stage to change the whole factual basis of his claim and base an entitlement of a deduction on the carrying on of a business which he never claimed to carry on.

The second reason why I am satisfied that the advocate cannot deduct this amount is that the amounts so paid are in the nature of capital expenditure. The determination of what is capital as opposed to income expenditure presents in certain cases a very difficult problem. No single test will ever suffice for

the different circumstances which may give rise to the problem. One of the reasons for this is that a thing which is a capital asset in the hands of one person is stock-in-trade in the hands of another. Further, a sum which in the hands of the payer is a capital expenditure may be in the hands of the receiver an income receipt. Fundamentally, however, the normal position is that if the owner of an asset, whether that asset be property, money, a right, a liability or knowledge while retaining the asset in his hands obtains benefits from its utilisation then the asset is a capital asset and the benefits income benefits, with the corollary that if the asset is lost then the loss is a capital loss. In this case the asset was the guarantee (which is a potential liability) and it was the utilisation of this asset which remained in the hands of the advocate that was designed to produce income benefits, that is the profits of the company in which profits the advocate would share. The concept is not easy to grasp, but if the fundamental facts were presented in a slightly different form, but a form which would have precisely the same effect, then it becomes simple. The guarantee was given because the company was in need of money in order to carry on its operations, which operations were designed to yield an income profit, and when the company failed the money due under the guarantee was paid and thus lost to the advocate. If instead of the guarantee being given the advocate (who was not a money-lender and whose stock-in-trade was not money available for loans) had invested the same amount of money in the company on a debenture loan and the company had failed in precisely the same way with the result that the money had been lost, clearly the loss would have been a capital loss. So too the loss of the money due under the guarantee is in the circumstances of this case a capital loss.

For these reasons I have reached the conclusion that the sums lost by the advocates are in the circumstances of this case not deductible as expenditure wholly and exclusively incurred in the production of the income of the advocates.

Accordingly I would allow the appeal of the Commissioner-General, set aside the judgment and decree of the High Court, substitute therefor a judgment and decree dismissing with costs the appeal to the High Court and confirming the assessments in question. I would allow the appellant the costs of this appeal with a certificate for two advocates. As Duffus, V.-P. agrees it is so ordered.

Duffus VP: The facts in this case have been fully stated in the judgment of Spry, J.A. which I have had the privilege of reading in draft form.

This appeal concerns the assessment of the income tax of the two respondents, advocates who practised in partnership as a firm of advocates known as Robson, Harris and Company. This firm incurred a loss in the Income Tax years 1962, 1963 and 1964 in having to pay up certain guarantees made by the second respondent Mr. B. J. Robson on behalf of a company known as Phoenix Productions Limited. The trial judge held reversing the decision of the Commissioner of Income Tax that these “were payments made in the discharge of liabilities of the firm or of Mr. Robson to the bank and other persons by reason of undertakings given or obligations incurred in the ordinary course of his activities as an advocate engaged as a member of the firm in a busy and extensive commercial practice.”

The two points for decision were whether these payments were expenditure wholly and exclusively incurred by the respondents in the production of their income for the respective years within the meaning of s. 14 of the East African Income Tax (Management) Act 1958 or alternatively whether in any event this expenditure was a capital expenditure within the meaning of s. 15 of the Act.

This is to a large extent a question of fact but there is no real dispute on the

facts of which evidence has been given and the real issue is on the first question whether the facts proved have been sufficient to establish that the payments amount to an expenditure wholly and exclusively incurred in the production of the respondents' income. The burden of proof in this instance is on the taxpayer, the respondents, to show that the deductions claimed were such an expenditure within the meaning of s. 14. The trial judge was satisfied that the guarantees were incurred by Mr. B. J. Robson on behalf of the firm in the ordinary course of the firm's activities as advocates engaged in a busy and extensive commercial practice. The trial judge has considerable experience in the practice of advocates in Kenya and in addition has had the evidence of the second respondent and the benefit of the evidence of three other experienced advocates in firms with considerable commercial practice in Nairobi. There can be no doubt that it is a common and accepted practice amongst advocates especially those firms specialising in conveyancing or commercial practice to guarantee payments that have to be made by their clients in the carriage of certain transactions by the firm.

I agree that advances or guarantees made or given on behalf of a client might, depending on the particular circumstances of each case, if such advances or guarantees resulted in a bad debt, be expenditure wholly or exclusively incurred in the production of income. The expenditure must, however, be wholly or exclusively incurred in the production of income. There is not a great deal of evidence in this case about the giving of the guarantees. I would refer here to the evidence of Mr. P. J. Robson. He said:

"After a time Phoenix wanted more money and had to get an overdraft from National and Grindlays Bank. I later approached some clients for loans. We approached the Bank in November 1956. Phoenix was formed in 1954 and Phoenix Studios in 1956. I signed guarantee to the Bank for the overdraft. I was the sole guarantor and I would have been personally responsible to the Bank but as between my partners (Harris and Robson) and myself this was to be a partnership liability. I have given guarantees before but only once had to pay a small sum. I had no reason to believe I would have to pay on this guarantee as it was for a temporary loan and was on basis of Riddlesbarger having agreed to put up further money to discharge the overdraft. These further moneys did not materialize"

and then in cross-examination Mr. Robson further stated that the loans which they guaranteed were used partly to pay the staff of Phoenix and partly to pay creditors, and he said:

"We made these payments to preserve Phoenix existence as a viable entity."

The guarantees appeared to have been given not only to the Bank but to some seven other private persons, but payments were made under these guarantees only to the Bank and five of those individuals. The payments under the guarantees were spread over a period of years as deductions were claimed for each of the years 1962, 1963 and 1964.

It does, however, appear clear that these guarantees were not given in respect of any work being then undertaken or in respect of any transaction being carried through by the respondent firm in their capacity as advocates. The guarantees appear to have been quite simply given in order to raise funds for Phoenix Productions Limited to be able to carry on its business. On the evidence these guarantees do not appear to have had any connection with any transaction or matter that would be dealt with by advocates in the ordinary course of an advocate's business.

The position might have been different if the respondents had carried on the

business of money-lenders or of some other financial concern connected with the guaranteeing of loans together with their partnership as advocates but this is not the respondents' case.

I would refer here to two of the United Kingdom decisions. First the case of the *Commissioners of Inland Revenue v. Hagart Burn-Murdoch* (1929), 14 T.C. 433. This was a decision of the House of Lords in a case from Scotland. There the decision was that the business of money-lending was not a part of the business of Writers to the Signet. The following extract from the judgment of Lord Warrington of Clyffe would in my opinion equally well apply to the practice of an advocate in Kenya:

"The profession in respect of which the balance of profits and gains were to be assessed was that of Writers to the Signet. The finding of the Commissioners merely amounts to this, that these gentlemen had from time to time been willing under circumstances of which no particulars are given to oblige clients in need of money by making temporary advances. No doubt in so doing they were probably actuated by the feeling that it was good policy to keep on good terms with their clients and that to refuse to make advances of money might entail a loss of business, but I cannot think that on these findings there is any ground shown for holding that the advances in question were made for the purposes of the Appellants' profession of Writers to the Signet. I cannot hold that the business of moneylending was so far part of the profession of these gentlemen as carried on by them as to be one of the purposes thereof, and I should much regret on grounds of public interest if I were compelled so to hold."

The judge relied to some extent on the judgment of Pennycuik, J. in the case of *Jennings v. Barfield & Barfield*, [1962] 2 All E.R. 959; 40 T.C. 365. With respect if this is an authority that the giving of a guarantee for a debt contracted by a client, not connected with any transaction being carried through by an advocate, is a matter within the ordinary course of an advocate's practice then I am of the view that this decision was wrong and should not be applied in Kenya. With respect though I do not consider that Pennycuik, J. intended his judgment to go to that extent. The guarantee here was in respect of a single guarantee to the Bank to the extent of £500. The overdraft was required by the client for three purposes:

—

- (a) to complete the acquisition of a showroom,
- (b) to pay for a deposit on a house,
- (c) to provide funds for carrying on his business.

The purposes (a) and (b) were concerned with transactions admittedly within the course of the ordinary practice of an advocate. Purpose (c) clearly was not. The judge dealt with this question as follows. He said:

"He points out, truly, that one of the purposes for which Mr. Knight needed an overdraft, as stated in para. 2 (vii) of the Case, was to provide funds for carrying on his business – this last being an activity outside those for which according to the evidence of Mr. Dulley, some solicitors were accustomed to enter into guarantees. But this particular purpose was only one of a number of purposes for which Mr. Knight required the money, the others being to complete a lease of new showrooms and to pay a deposit on a house he was purchasing. Those are purposes in connection with which, according to the evidence, some solicitors give guarantees, and I do not think it would be right to treat the giving of the guarantee as outside the ordinary practice of solicitors simply on the

ground that the purposes of the client included, amongst others, that of carrying on his business.”

It would appear to me here that the judge is not saying here that the giving of a guarantee for the purpose of carrying on his business was a guarantee given within the ordinary course of a solicitor’s business, but as the guarantee was given, inter alia, for other purposes connected with the ordinary practice of a solicitor that it should not be excluded by the inclusion of a purpose not so connected.

With great respect to the trial judge I cannot accept that the very wide and numerous guarantees that were given in the circumstances of this case were guarantees given in the ordinary course of an advocate’s practice.

The matter is further complicated here by the undoubted fact that the second respondent had an active and personal interest in this company. He had advanced £10,000 of his own money free of interest to the company and then in addition to this he was said to be the company’s executive producer and also a Director of the company. No evidence was led to show exactly what was meant by his being the executive producer but clearly here Mr. B. J. Robson had considerable interest in the company and the question does arise whether his personal guarantee was not given in order to protect his own interest in the company rather than with the view to obtain or attract further work for the respondent firm.

I am definitely of the view that it has not been established in this case that the payments made in the various guarantees were expenditure wholly and exclusively incurred in the production of the respondents’ income. In these circumstances, I do not consider it necessary to further consider whether it was a capital loss within the meaning of s. 15 of the East African Income Tax (Management) Act 1958. I agree with My Lord President that these appeals be allowed and I agree with the order that he proposes.

Appeal allowed.

For the appellant:

M. G. Muli (Deputy Counsel to the Community) and *T. T. M. Aswani*

For the respondents:

P. J. Wilkinson, Q.C. (instructed by *Robson, Harris & Co.*, Nairobi)

Uchai v Elikana
[1970] 1 EA 224 (HCT)

Division:	High Court of Tanzania at Arusha
Date of judgment:	26 October 1968
Case Number:	16/1967 (170/69)
Before:	Platt J
Sourced by:	LawAfrica

[1] *Estoppel – per rem judicatam – Judgment in maintenance proceeding – Whether marriage can be*

challenged in subsequent proceedings – District Courts (Separation and Maintenance) Ordinance (Cap. 274), s. 8 (T).

[2] Matrimonial Causes – Maintenance – Judgment in maintenance proceedings – Whether marriage can be challenged in subsequent proceedings – District Courts (Separation and Maintenance) Ordinance (Cap. 274), s. 8 (T).

Editor's Summary

In February 1966 the appellant was ordered by the District Court to pay maintenance at Moshi to his wife, the respondent. The court found that the marriage was a monogamous marriage. In June 1967 the appellant applied under s. 8 of the District Courts (Separation and Maintenance) Ordinance for a discharge of the order of the grounds inter alia, that the marriage was a customary marriage. The court refused to entertain the application on the ground that it was res judicata. On appeal the appellant argued that the doctrine of res judicata did not apply to matters of this nature, and that he could challenge any order upon bring fresh evidence.

Held –

- (i) res judicata could apply to maintenance proceedings if there was no fresh evidence. (*R. v. Middlesex Justices, ex p. Bond* (2) followed.)
- (ii) the appellant had proposed to adduce fresh evidence and the magistrate should have heard the evidence and ruled on it.

Appeal allowed. Case remitted for hearing.

Cases referred to in judgment:

- (1) *Johnson v. Johnson*, [1900] P. 19.
- (2) *R. v. Middlesex Justices, ex p. Bond*, [1933] 2 K.B. 1.
- (3) *In re Wakeman*, [1947] 2 Ch. 607.

Judgment

Platt J: This is an appeal from the ruling of the Senior Resident Magistrate of Moshi in which he refused to entertain an application under s. 8 of the District Courts (Separation and Maintenance) Ordinance (Cap. 274). That application dated 1 June 1967, was made by the appellant Ernest Uchai, the husband of the present respondent Eunice Elikana for a discharge of the order by which Eunice had been granted maintenance under the Ordinance. The latter order dated 17 February 1966 declared that Ernest should pay Shs. 125/- per month as a maintenance, Shs. 75/- towards rent, and also that Ernest should return certain furniture in his possession said to belong to Eunice. This order had been made by a predecessor of the Magistrate from whose ruling the present appeal has been preferred, and the question of substance on the appeal is whether the second Magistrate had jurisdiction to entertain the application for discharge of the order of the first Magistrate granting Eunice maintenance.

The effect of the ruling now under review was that the points raised in the affidavit accompanying Ernest's application challenged the jurisdiction of the court on all the issues already adjudicated upon; therefore it was an indirect

method of asking for a hearing de novo. Though s. 8 of the District Courts (Separation and Maintenance) Ordinance gave the court wide powers to entertain such an application, nevertheless, such application could only be entertained where the issues arising on the application did not involve the doctrine of res judicata. The Senior Resident Magistrate concluded that the application before him was res judicata and consequently he dismissed it.

It will be as well to set out the provisions of s. 8 of the Ordinance so far as they are relevant:

“8.(1) The court may on the application of the married woman or of the husband and upon cause being shown upon fresh evidence to the satisfaction of the court, at any time alter vary or discharge any such order and may upon any such application from time to time increase or diminish the amount of any payment ordered to be made.”

It was argued for Ernest, the appellant, that the wide powers set out in the section were not meant to be restricted to mere increases or decreases in the amount to be paid as maintenance, or indeed to a discharge under the provisions of s. 8 (2) of the Ordinance. The appellant was permitted to challenge “any such order” upon bringing fresh evidence. Nor did this make the right of appeal as provided in s. 16 of the Ordinance otiose. Equally, the doctrine of res judicata did not apply to matters of this nature. This part of the argument was based on the narrow ground that the matter not being a suit proper the doctrine did not apply. Counsel for the appellant could cite no authorities for this argument. It seems that what really exercised him most was that in his view the parties had never been married in accordance with s. 2 of the Matrimonial Causes Ordinance (Cap. 364), as provided by the District Courts (Separation and Maintenance) Ordinance, and therefore, as there was fresh evidence to support that contention, the learned Magistrate should have given him the opportunity of adducing it before ruling him out of court.

The question at issue then is largely a matter of the proper construction to be put upon s. 8. Fortunately, that section is in very similar terms to the provisions of analogous English Statutes concerning which there is a good deal of authority. (See Halsbury’s Laws of England, Vol. 12, pp. 491 *et seq.* The Summary Jurisdiction (Married Women) Act 1895 (58 & 59 Vict. Cap. 39); the Guardianship of Infant Acts 1886 and 1925, and the Summary Jurisdiction (Separation and Maintenance) Act 1925 and other later provisions.) From the authorities, the following propositions may be deduced.

First, it is not right to say that the doctrine of res judicata can have no application to proceedings of this nature, and a clear instance where the doctrine was held to operate, is to be found in *Rex v. Middlesex Justices, ex p. Bond*, [1933] 2 K.B. 1, in which Scrutton, L.J. said: “It is quite clear that the Justices can upon fresh evidence alter, vary or discharge the order that they had previously made . . . but it appears to me quite clear that the Justices cannot alter their previous order, when as in this case, there is no evidence of any fresh circumstances.” That was a case under the Guardianship of Infants Acts 1886 and 1925, but the principle would apply as much to the present case. Therefore, once there is fresh evidence, the present Ordinance permits the order to be varied otherwise it does not. (See also *In re Wakeman*, [1947] 2 Ch. 607 and 613.)

Secondly, the fresh evidence is not restricted as to subject matter. So for instance, it may concern not only matters connected with sums of maintenance to be awarded, but also matters effecting the position of the parties as spouses. Thus fresh evidence has been admitted to show that the order must be discharged because at the time of the wife’s marriage her former husband was still alive.

(Halsbury's Statutes, Vol. 12, pp. 492 and 493, note (j) and the authorities there cited.) In the present case, the question was whether the marriage of Ernest and Eunice was a customary union or one falling within the definition in s. 2 of the Matrimonial Causes Ordinance, namely, the voluntary union of one man and one woman for life to the exclusion of all others. As the District Courts (Separation and Maintenance) Ordinance only applies by virtue of s. 2 (2) to a marriage within the definition of s. 2 of the Matrimonial Causes Ordinance, it follows that the distinction is vital. The first trial Magistrate held that the marriage fell within the definition, while Ernest argues that it was a customary union; therefore if there was fresh evidence on this matter, then it ought to have been admitted.

Then thirdly, there is the question as to what fresh evidence consists in. *Johnson v. Johnson*, [1900] P. 19 makes clear the meaning. Jeune, P. lays down that:

"It means practically the same sort of evidence as that upon which a new trial would be granted; it must relate to something which has happened since the former hearing or trial, or it must be evidence which has come to the knowledge of the party applying since that hearing or trial, and which could not by reasonable means have come to his knowledge before that time."

That was a case under the Summary Jurisdiction (Married Women) Act 1895, s. 7, which made similar provision to s. 8 of the District Courts (Separation and Maintenance) Ordinance now under review. The learned President's observations do not appear to have been dissented from at least as far as I am aware and with respect I would adopt them.

With these principles in mind, I turn to the present appeal. In Ernest's application it is said that paras. 3 to 8 set out sufficient matters about which fresh evidence may be adduced, but as far as I can see, para. 3 raises nothing new, while para. 6 raises a legal question, not apparently connected with any fresh evidence. Paragraph 8, formally applies for the discharge of the order. It is then paras. 4, 5 and 7 which are relevant. Paragraphs 4 and 5 deal with the question whether a Christian marriage had been solemnised, while para. 7 deals with the question of alleged desertion, neglect or cruelty towards Eunice. On the question of the marriage, Eunice had said in her original application that she was Ernest's legal wife, the marriage having taken place at the Native Authority Court of Mamba, Kilimanjaro Region. Although she further states that she and Ernest are Christians, it is not clear whether she alleged that her marriage had been a customary union or a Christian union. Ernest, in his defence stated clearly that their marriage had taken place at customary law on a polygamous basis on payment of bride price, as indeed the Local Authority Certificate had witnessed. It was no doubt a surprise therefore that Ernest should then hear Father Seti testify that he understood that the marriage had been blessed by Father John Massey. Moreover, the witness Yohana Mkomeni testified that he had seen Father John carry out the ceremony. In para. 5 of Ernest's application, it is stated that fresh evidence is available to show that Father John could not have blessed the marriage as he had already left before that date. And para. 4 states that there is fresh evidence to show that there are no records that any such ceremony took place. If this is so – that there is admissible fresh evidence – then it might influence the court in coming to a different conclusion to that reached by the first Magistrate. In the latter's careful order it is clear that one of the facts which influenced him was the blessing of the marriage by Father John. Therefore without the evidence as to this ceremony, it could well be that a different view would be taken. Now, I was referred to an opinion of this court in which it was held that such a ceremony

could never in law convert a customary union into a Christian union as defined in s. 2 Cap. 364. While that may be a sound proposition, without fresh evidence to challenge the facts, the decision of the first Magistrate which implies that such a ceremony could give rise to a Christian union, could only be challenged on appeal. It would be *res judicata* if challenged before another Magistrate. On the other hand, if there were fresh evidence that no such ceremony had ever taken place then an application to discharge the order put before a succeeding Magistrate would not be *res judicata*. Therefore, it was a question whether there was fresh evidence or not, and consequently the second Magistrate, in this case, should have allowed Ernest to put forward the fresh evidence he claimed to have. Similarly, with regard to para. 7, as Eunice had brought her application under s. 3 (1) (b) and (c), if there was fresh evidence to show that Ernest had not deserted her or been guilty of neglect or cruelty, the basis of the application by Eunice would again disappear. In either case it cannot be said at the moment whether there is or is not admissible fresh evidence, but that will be for the Magistrate to ascertain.

In the result, the appeal is allowed not so much because the Magistrate was wrong in applying the doctrine of *res judicata* since it may still apply, but because it appears to have been applied prematurely before Ernest had been given the opportunity of putting his alleged fresh evidence before the court. The record is remitted to the lower court for the application to proceed, and Ernest shall have the costs of this appeal.

Appeal allowed.

For the appellant:

B. Gossain

For the respondent:

J. S. Patel

Fadhili v Juma
[1970] 1 EA 227 (HCT)

Division:	High Court of Tanzania at Arusha
Date of judgment:	11 March 1969
Case Number:	141/1968 (171/69)
Before:	Platt J
Sourced by:	LawAfrica

[1] Civil Practice and Procedure – Irregularities – Assessors’ opinions not recorded – Whether requirement mandatory – Magistrates Courts Act (Cap. 537), s. 8 (T).

Editor’s Summary

The plaintiff obtained a judgment against the defendant in a Primary Court of Nduruma in a suit for damages he sustained as a result of a fire spread to his plantation due to the defendant's alleged negligence. Under s. 8 (1) of the Magistrates Courts Act the presiding magistrate is required to record the assessors' opinions. The record of the proceedings in the Primary Court did not show whether the assessors were called upon to give their opinions nor what those opinions were. The District Court, on appeal, upheld the Primary Court's decision. The defendant appealed to the High Court on the ground that as s. 8 (1) of the Act was not complied with the trial in the Primary Court was a nullity.

Held – The requirement that the assessors' opinions be recorded is mandatory. The judgment given by the Primary Court without the opinions of the assessors having been recorded was a nullity.

Appeal allowed.

No cases referred to in judgment.

Judgment

Platt J: This appeal arises out of the decision of the Primary Court of Nduruma given on 6 December 1966, in which the plaintiff/respondent was given judgment for Shs. 336/-, together with costs of Shs. 22/-, against the defendant/appellant. I shall hereafter refer to the parties according to their position at the trial. The plaintiff brought his suit for damages as a result of loss sustained on his plantation occasioned by a fire which was alleged to have been started by the defendant on the latter's plantation and which spread to the plaintiff's plantation due to the defendant's alleged negligence.

On first appeal to the District Court of Arusha, the primary court's decision was upheld, but the damages awarded were reduced as a result of a visit to the scene by the District Court Magistrate. The defendant now appeals to this court and was allowed to do so out of time. The two main grounds of appeal are that firstly the trial in the primary court was null and void because the assessors never gave any opinion before judgment was passed, and secondly, the evidence given at the trial was unreliable in comparison with that given in earlier proceedings. As the second ground of appeal will be overtaken by the first, as I hope to show in due course, it will not be necessary for me to consider it.

The respondent in his argument raised a matter which should really have been brought by way of a cross appeal. This he did not do and he asked the court to exercise its revisional jurisdiction. This again is not a matter with which I am bound to deal but I would simply point out that by virtue of rr. 4 and 6 inclusive in the rules of Court – Civil Procedure (Appeals in Proceedings Originating in Primary Courts) G.N. No. 312 of 1964, appeals to the High Court cannot be made orally and in the case of cross-appeals, the appeals must be registered separately. Further, by virtue of ss. 26 and 28 of the Magistrates Courts Act, it appears that the High Court cannot entertain an application for revision when the parties are before the court on appeal. No doubt it is possible for the High Court to exercise revisional jurisdiction concerning parties to the suit but not taking part in the appeal. But if the parties to the suit are present at the appeal and the respondent wishes to challenge a particular finding, not raised by the appellant, then the respondent must appeal by way of a cross-appeal. This is all the more so when as in this case, the parties were represented by Counsel. It would seem to follow that the cross-appeal now suggested would be out of time, and an application under rule 3 of the Rules of Court mentioned above, for leave to appeal out of time, would be necessary.

The main question is whether the trial was rendered null by the procedure adopted by the trial Magistrate. The proceedings were commenced in October 1966, and the Magistrate sat with two assessors. The trial proceeded in an orderly manner until all the evidence was heard and recorded. The appellant called no witnesses in his defence and the matter was apparently adjourned for judgment. Nothing appears on the record as to whether the assessors were called upon to give their opinions or what those opinions were. Neither can I find anything in the Magistrate's judgment which would indicate that the assessors had given their opinions, although it seems they were present at the time the judgment was given. In pursuance of s. 8 of the Magistrates Courts Act, it was said by Counsel for the appellant that without the opinions of the assessors being recorded, the trial was a nullity. Learned Counsel for the respondent argued that as the trial court was not bound to follow the advice of the assessors, the trial magistrate's lapse did not materially affect the validity of the judgment, and he pointed out that the

matter had not been raised on first appeal.

Section 8 in its original form gave some colour to the respondent's argument, but it was amended with effect from 15 July 1965, and sub-s. (1) which is most pertinent to the issue now before me, is as follows:

"8.(1) In every proceeding in a primary court, the court *shall* sit with two assessors (or such greater number as an appropriate judicial authority may direct); and every such assessor shall be required, before judgment, to give his opinion as to the case generally and as to any specific question of fact addressed to him by the presiding magistrate, and the magistrate shall record the same."

This provision of law is clear and mandatory requiring the assessors to give their opinions on the facts of the case and not simply as the old section provided as to any point of customary law which arose. It is also clear that judgment cannot be given without the opinions of the assessors having been recorded. It is true that s. 8 (3) empowers the trial magistrate to give his decision without being bound by the opinions of the assessors. But in the event of the Magistrate's view not conforming with those opinions, he must record his reasons in writing. The respondent argued that no injustice could have been caused by the Magistrate's failure to comply with the section. With respect, I cannot accept that argument, since neither the first appellate court nor this court is in a position to ascertain whether any injustice was caused or not. It may well be that assessors did agree with the decision of the trial magistrate, but in my opinion an important principle is at stake. As the law provides for the opinions of assessors to be given in open court, and recorded as part of the record, it is clear that a safeguard has been established whereby a decision given by a primary court shall be founded upon the broad basis, not only of the opinion of the Magistrate himself, but also on the views of assessors. In my opinion it will be contrary to the principle to allow a decision to stand which was not founded upon the safeguards provided by s. 8 of the Act.

Accordingly I hold that the trial was null and of no effect. The proceedings are quashed, and there will be a new trial before a court of competent jurisdiction. I leave the matter of costs and such further directions as may be necessary to be made after the parties have been able to put forward their views.

Appeal allowed.

For the appellant:

J. C. Patel

For the respondent:

J. W. Kiritta

Karuki v Republic
[1970] 1 EA 230 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	29 August 1969
Case Number:	470/1969 (6/70)
Before:	Mwendwa CJ and Simpson J
Sourced by:	LawAfrica

[1] Criminal Practice and Procedure – Sentence – Magistrate’s powers – Fine imposed in order to increase permissible sentence of imprisonment – Not proper.

[2] Criminal Practice and Procedure – Sentence – Magistrate’s powers – Remission to Resident Magistrate for sentence – When proper – Criminal Procedure Code (Cap. 75), s. 221 (1) (K).

Editor’s Summary

The appellant was convicted of entering a dwelling-house with intent to commit a felony and the District Magistrate sentenced him to 12 months’ imprisonment and a fine of Shs. 500/- and in default of payment a further 6 months’ imprisonment. A higher sentence of imprisonment could not have been imposed by the magistrate.

Held –

- (i) the fine was not imposed by reason of the circumstances of the offence and the capacity of the appellant to pay, and must therefore be set aside;
- (ii) where a penalty in excess of the jurisdiction of the magistrate is called for, the accused should be remitted for sentence to a Resident Magistrate.

Sentence reduced.

No cases referred to in judgment.

Judgment

The considered judgment of the court was read by **Mwendwa CJ**: The appellant was convicted by a District Magistrate with powers to hold a subordinate court of the second class of entering a dwelling-house with intent to commit a felony, an offence under s. 305 (1) of the Penal Code, and sentenced to 12 months’ imprisonment and a fine of Shs. 500/- or in default 6 months’ imprisonment.

He now appeals against sentence only.

The appellant admitted three previous convictions, two of them for house-breaking. The sentence was manifestly inadequate.

The powers of a subordinate court of the second class are laid down in s. 7 (3) of the Criminal Procedure Code. Such courts –

“... may pass the following sentences in cases where they are authorized by law, namely –

- (a) imprisonment for a term not exceeding twelve months;
- (b) a fine not exceeding two thousand shillings;
- (c) corporal punishment not exceeding twelve strokes.”

Subsection (5) of the same section provides as follows:

“In determining the extent of a court’s jurisdiction under this section to pass a sentence of imprisonment, the court shall have the jurisdiction to

pass the full sentence of imprisonment provided for in this section in addition to any term of imprisonment which may be awarded in default of payment of a fine, costs or compensation.”

The sentence imposed by the magistrate in this case came within his powers but the fine was clearly added not because the circumstances of the offence and the capacity of the appellant to pay warranted the imposition of a fine in addition to imprisonment but with the sole object of increasing the term of imprisonment. This practice is becoming prevalent in subordinate courts of the second and third class. In our opinion it is an undesirable practice and should cease.

Where, as in this case, a penalty in excess of the jurisdiction of the magistrate is called for advantage should be taken of the provisions of s. 221 (1) of the Criminal Procedure Code and the accused committed to a Resident Magistrate’s Court for sentence. These provisions which have been in force now for two years are all too seldom used by District Magistrates.

Having regard to the foregoing we allow the appeal to the extent of setting aside that part of the sentence which imposes the fine of Shs. 500/- or 6 months imprisonment in default.

Sentence varied.

The appellant was absent and unrepresented.

For the respondent:

J. S. Mwangi (State Counsel)

Githinji and another v Republic [1970] 1 EA 231 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	29 August 1969
Case Number:	543 and 549/1969 (10/70)
Before:	Mwenda CJ and Simpson J
Sourced by:	LawAfrica

[1] *Criminal Practice and Procedure – Jurisdiction – Increase of jurisdiction of magistrate between commission of offence and trial – Effect – Criminal Procedure Code (Cap. 75), s. 7 (1A); Criminal Law Amendment Act 1969, s. 7; Interpretation and General Provisions Act (Cap. 2), s. 64 (K).*

[2] *Evidence – Identification – Identification parade – Witness able to ascertain who is suspect – Evidence valueless.*

Editor’s Summary

The appellants were convicted of robbery with violence, the alleged offences having been committed

before the Criminal Law Amendment Act 1969 came into force. The Act was however in force by the date of the trial. The appellants were sentenced to 14 years' imprisonment with 24 strokes. The evidence against the first appellant was his identification at an identification parade. The parade was the second held on the same day, and consisted of the same ten members of the public with only the first appellant substituted for the second appellant. It was thus possible for the witnesses (who attended both parades) to know who the suspect was.

Held –

- (i) the identification parade was valueless, and the first appellant must be acquitted;
- (ii) in the absence of argument concerning the effect of Criminal Procedure Code, s. 7 (1A) on the magistrate's jurisdiction, the question was left open

and the sentence of the second appellant would be reduced to the maximum formerly within the power of the magistrate.

First appellant's appeal allowed.

Second appellant's appeal dismissed. Sentence varied.

No cases referred to in judgment.

Judgment

The considered judgment of the court was read by **Mwendwa CJ**: The two appellants in these consolidated appeals were convicted of robbery with violence contrary to s. 296 (2) of the Penal Code and each was sentenced to 14 years' imprisonment together with 24 strokes corporal punishment. They now appeal against both conviction and sentence.

The facts, briefly stated, are as follows:

On the evening of 5 February 1969, James Kimani, a youth aged 17, was left in charge of his brother's shop at Riara Ridge. Next door, connected by a common passage, is an eating place in the same ownership which was left in charge of Ndungu Kariuki aged 16. At about 9.20 p.m. P.W.1, having locked the shop but left the electric lights on, went to the eating-place to listen to the radio. At about 9.30 p.m. he returned and as he entered the shop the door was pushed violently against him so that he fell. He rose immediately and saw a man enter with a panga in his hand. This man slashed him with the panga in the arm-pit and he again fell down. He then saw two other men come in followed by a fourth man with Ndungu who had been struck with a stick by this man and brought from the eating-house to the shop. Both witnesses testified that the four men took away cash and other goods, such as cigarettes, butter and bottles of mineral water from the shop.

At identification parades held a week later both witnesses identified two suspects as the first man to enter who became the 2nd accused (2nd appellant) and the fourth man who became the 1st Accused (1st appellant).

A number of points were raised by Mr. Otieno, counsel for the first appellant, none of which were considered to be of any substance and his appeal against conviction would undoubtedly have been dismissed had not Mr. Otieno in a brief reply to State Counsel drawn our attention to the Identification Parade Reports which had been admitted as Exhibits 2 and 3. Exhibit 2 shows that the suspect on the first parade held at 2.30 p.m. on 12 February was the 2nd appellant who was identified by both P.W.1 and P.W.2. The second parade was held at 2.45 p.m. on the same day. The parade consisted of the same 10 members in the same order as on the first parade. The 1st appellant was then called to take his place and both witnesses identified him. The 1st appellant after identification not unreasonably complained "The witnesses had seen the members of Parade during my absence. I am not certified (sic) with the conduct of the parade and the witnesses." It is obvious that when they were brought before the second parade the two witnesses had only to look along the line of men to observe that the parade was identical with the first parade except for the absence of the 2nd appellant. In his place was another man who must be the suspect. Once a witness knows who the suspect is an identification parade is valueless. The police might as well bring the suspect alone before the identifying witnesses and say "This is the man we suspect. Can you recognise him?"

In this case apart from the identification parade and identification in Court,

which is in the circumstances valueless, there is no evidence to connect the 1st appellant with the offence. None of the stolen property was found in his possession. He was arrested by P.C. Wambugu “because of information which I had received from which I know description of his appearance.” He gave neither the name of the person who provided the description nor details of the description. There is no evidence that either of the eye-witnesses gave any description to assist the police in tracing the robbers.

The appeal of the 1st appellant must be allowed.

Mr. O. Kapila on behalf of the 2nd appellant adopted the submissions of Mr. Otieno and raised some additional matters which we shall dispose of very briefly.

It was submitted that the circumstances of the robbery were such as to make subsequent identification difficult. We cannot agree.

The two witnesses had ample opportunity to see the 2nd appellant in the illumination provided by the electric light. It was suggested that it was hardly credible that P.W.1 would switch on the light before he went out as he appeared to say in evidence but it is clear that what he meant was that at some stage during the evening and before he went out he had switched on the lights. He did this presumably when it became dark and naturally left them on when he expected to be absent for not more than a few minutes. There were no inconsistencies of any substance in the evidence of P.W.1 and P.W.2 and we can find no fault with the conduct of the 1st identification parade. The 2nd appellant was not satisfied with the conduct of the parade but all he could say was “I think the witness was instructed by Askaris to identify me,” a comment indicating no more than a suspicion which was not followed up in cross-examination of the prosecution witnesses. It was submitted that it had not been shown that the two witnesses had no opportunity to communicate with each other. According to the record the inspector who conducted the parade said:

“I then sent accused No. 2 into the Petty Crime Office of the police station, where he could not communicate with P.W.2 who was in the canteen outside the premises of the police station.”

It is clear from the context that by “accused No. 2” the learned magistrate meant “P.W.1”.

In an unsworn statement in his defence the 2nd appellant said he was building a kitchen for his mother on the day of the robbery and spent the night at his mother’s house. His mother confirmed this, adding in cross-examination that her son went to bed at 9 p.m. but that she did not know if he was in his room between 9 p.m. and 3 a.m. The magistrate had no hesitation in rejecting this defence and we are satisfied that before doing so he gave it adequate consideration.

With regard to sentence counsel for the 2nd appellant submitted that the magistrate erred in taking into consideration amendments in the law introduced by the Criminal Law Amendment Act 1969 (No. 3 of 1969). Unfortunately this point was not fully argued by either counsel for the appellants and State Counsel appeared to concede it.

This offence was committed on 5 February 1969. The Criminal Law Amendment Act 1969, came into force on 25 March 1969. This provides inter alia a minimum penalty of 14 years’ imprisonment for offences under s. 296 (2) of the Penal Code. Section 64 of the Interpretation and General Provisions Act (Cap. 2) is relevant and reads as follows:

“Where an act or omission constitutes an offence, and the penalty for such

offence is amended between the time of the commission of such offence and the conviction therefor, the offender shall, in the absence of express provision to the contrary, be liable to the penalty prescribed at the time of the commission of such offence.”

It is clear that this amended penalty cannot apply to an offence committed before the coming into force of the amending Act. The magistrate however did not purport to act under that provision, but under s. 6 of the Act.

By s. 6 a new subsection, (1A), is added to s. 7 of the Criminal Procedure Code, as follows:

“Notwithstanding the provisions of sub-s. (1) of this section a subordinate court of the first class held by a Senior Resident Magistrate or a Resident Magistrate may on the conviction by such court of any person under ss. 296, 297, 308 or 322 of the Penal Code, pass any sentence authorised for such offence.”

This subsection does not have the effect of altering any penalties. It increases the powers of Resident Magistrates in relation to crimes of violence and receiving stolen property.

Section 64, Interpretation and General Provisions Act, has no application to this provision.

The maximum penalty provided before amendment by the Criminal Law Amendment Act 1969, by ss. 296 and 297 of the Penal Code was imprisonment for life, a penalty beyond the powers of a Senior Resident Magistrate. The maximum penalties provided by ss. 308 and 322 were 10 years’ imprisonment and 7 years’ imprisonment respectively, penalties beyond the powers of a Resident Magistrate. It could therefore be argued that s. 6 of the amending Act increases the powers of such magistrates with effect from the date of commencement of the Act. This was the view taken by the Resident Magistrate in this case. On the other hand a case could be made for interpreting s. 6 as relating only to the amended penalties. In the absence of any argument on behalf of the Republic we feel we have no alternative but to leave the matter open.

As far as the present appellant is concerned therefore we reduce the sentence to the maximum which could have been imposed by the magistrate prior to the date of commencement of the amending Act.

We dismiss the appeal of the second appellant against conviction but reduce the sentence to 5 years’ imprisonment with 24 strokes corporal punishment.

First appellant’s appeal allowed.

Second appellant’s appeal dismissed. Sentence varied.

For the first appellant:

S. M. Otieno

For the second appellant:

D. V. Kapila

For the respondent:

J. S. Mwangi (State Counsel)

[1970] 1 EA 235 (HCK)

Division: High Court of Kenya at Nairobi
Date of judgment: 28 August 1969
Case Number: 591/1969 (13/70)
Before: Miller J
Sourced by: LawAfrica

[1] Evidence – Identification – Identification in office – No record of other persons present – Whether identification satisfactory.

[2] Evidence – Document – Admissibility – Document alleged but not proved to be in appellant's handwriting – Not admissible – Evidence Act (Cap. 80), s. 70 (K).

Editor's Summary

The appellant worked in the complainant's office in Nairobi. He was accused of uttering false documents and obtaining goods by false pretences by producing false lists of goods to the complainant's grocer in Pangani and collecting the goods. The lists were produced but no attempt was made to prove that they were in the appellant's handwriting. Copies of the invoices prepared by the grocer were admitted in evidence. The main evidence of identification was in respect of a visit to the complainant's office in Nairobi by the grocer who picked out the appellant. There was no evidence of what other male Africans were in the office, if any. The appellant had raised an alibi and said that he could not have been away from the office for the time required.

Held –

- (i) the copy documents were improperly admitted in evidence as they were alleged and not proved to have been written by the appellant;
- (ii) the identification at the office was unsatisfactory and might have been different at a properly conducted identification parade;
- (iii) the offence was not proved with certainty.

Appeal allowed.

No cases referred to in judgment.

Judgment

Miller J: The appellant Robert Palia Alfayo Simekha was on 4 June 1969 convicted by the Senior Resident Magistrate Nairobi on each count of a charge comprising six counts. Three of the counts alleged the uttering of false documents contrary to s. 353 of the Penal Code and the other three counts alleged the obtaining by false pretences upon the occasions of the uttering of each of the false documents. The appellant was sentenced to a total period of three years' imprisonment and he appeals against conviction

and sentence. The gist of the prosecution's case is that the appellant was for two years employed as a telephonist typist to the University Press of East Africa at Bank House, Government Road, Nairobi. Mrs. Mary Bridge worked as production editor of this company and she has been a customer of a provision store owned by Mr. and Mrs. Kara and situated at Fort Hall Road, Pangani. On 5, 11 and 19 February 1969 the appellant falsely represented to Mrs. Kara at the provision store that he was sent by Mrs. Bridge to collect groceries and other goods chargeable to the account of Mrs. Bridge. On each occasion he presented a list of goods written in freehand writing and in no way indicative of its having originated from Mr. or Mrs. Bridge with whom the Karas were accustomed to deal. Mrs. Kara believed the appellant when he said that he was sent by Mrs. Bridge and with the concurrence of Mr. Kara she supplied

him with the goods requested on the 5 February 1969 and then on 11 and 19 February 1969. On each occasion Mrs. Kara kept the written list of goods and secured the signature of the appellant on an invoice which she made out before delivering the goods to him. Mrs. Kara swore that the appellant signed the invoices in her presence and through this witness the prosecution tendered the three written lists of goods and three carbon copies of the relevant invoices. Chronologically the signatures on the copy invoices are: “Cedia”, “Ejidha” and “Ejidha” and Mrs. Kara was emphatic that on each occasion the appellant went to the store between 10 a.m. and midday. She also conceded that she did not check the signatures as she was busy. It is appropriate to mention that in her evidence Mrs. Bridge said that “Ejidha” is the name of a gardener who was employed by her up to November 1968 but he could not write and her cook’s name is “Odie” but his handwriting is not similar to those of the signatures on the copy invoices. The cook, one Clement Atia son of Ogutu, gave evidence for the prosecution disowning the signature “Cedia” and collection of the goods involved. The appellant was not represented by counsel and was not expected to be able to make legal submissions but as Mrs. Kara the first prosecution witness testified and the first copy invoice was being tendered through her as an exhibit the trial Magistrate appeared to have reflected upon the question as to whether or not it was in the circumstances legally receivable in evidence and the record of proceedings shows as follows, viz.:

“*Court* . . . Secondary evidence may be given under s. 68 (1) (a) (1) of the Evidence Act, ‘if there is a notice to produce under s. 69’. However I think this is a proper case to dispense with the requirement under s. 69 (VII) of the Act and I admit this copy document as Ex. 2.

Accused when asked, states, ‘I do not have the original’.”

It is patent on the record that the document was admitted in evidence entirely at the instance of the Magistrate and then some unidentified person proceeded to question the appellant as to the whereabouts of the original. It is also reasonable to conclude that the question put to the appellant was either – “Where is the original?” or “Have you got the original?” As intimated above this episode transpired not during cross-examination of the appellant but as he listened to the evidence of the first prosecution witness Mrs. Kara. I may be completely wrong but I incline to the view that this occurrence cannot by the most sincere explanation withstand an allegation that even at that early stage of the trial the appellant was impliedly being asked to prove his innocence with respect to a vital aspect of the charges against him. This Court is also satisfied that the trial Magistrate was wrong in applying the provisions of the sections of the Evidence Act shown above when deciding to receive the carbon copy invoices in evidence for the record shows that the second and third copy invoices were admitted on the same grounds as the first. It is enough to point out that this was a criminal case and that the following provisions of s. 70 of the Evidence Act were appropriate:

“If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person’s handwriting must be proved to be in his handwriting.”

In the present case although the written lists of goods, the copy invoices and no doubt specimens of the appellant’s handwriting during his two years employment with the University Press were clearly available no attempt was made to compare these and to lead evidence as to the results of such comparison. It must be pointed out that it was not necessary to prove that the appellant committed forgery in order to establish the case against him, but the Magistrate

without reservation accepted the evidence of Mrs. Kara which included the allegation that the appellant signed the invoices; accordingly and with particular reference to the law under which he purported to act in receiving the copy invoices in evidence he was in error and the unreserved acceptance of Mrs. Kara's evidence was not justified. It is perhaps as a result of the total acceptance of Mrs. Kara as a witness of truth even before she had completed her evidence in chief that the appellant was called upon to account for the original of an invoice of which she spoke. Whichever way the prosecution's case is viewed its success or otherwise depended upon the satisfactory identification of the appellant as the person who presented the lists of goods, signed the invoices and uplifted the goods. The magistrate quite rightly recognised this and wrote as follows:

"I am satisfied there was no mistake over the identification by Mr. and Mrs. Kara. There is no doubt in my mind that accused produced these three documents and that they were clearly forgeries. Neither have I any doubt that accused by his action and words, on each occasion pretended that the chits he produced were good and valid orders by Mrs. Bridge, who would in this context, I think, come within the description of being his employer. Clearly this was a false pretence on each occasion and, equally clearly the pretence operated on the mind of Mrs. Kara so as to induce her to part with the goods. In the case of the uttering charges, having considered each occasion separately, I am satisfied from all the circumstances of the case that accused uttered these documents knowingly."

The question of the identification of the appellant rested principally on the evidence of Mrs. Kara who said: "on 31 March 1969 I accompanied an Inspector of Police to the office of Mr. Bridge at the University Press of Africa in Nairobi. I was taken around the office by the policeman. Mr. Bridge was present, I recognised accused as the man who had come in with the orders. He was arrested." Mrs. Kara was supported in evidence by her husband to the effect that the appellant went to the store on 5 February 1969 and obtained goods as alleged by the prosecution. In a less precise manner he purported to have also seen the appellant on the occasions of the transactions of the 11th and 19th. But this court is concerned with identification on the evidence as a whole adduced before the trial court. It is still a guiding principle in assessing evidence that the court should have regard as to that which a witness in the position of the person testifying is most likely to say under certain circumstances. Although Mr. and Mrs. Kara might be completely honest it cannot be ruled out that in the case of Mrs. Kara who pointed out the appellant at the Press her identification might have been entirely different if the appellant together with Mrs. Bridge's cook Atia were placed on a regular identification parade at a police station and she was suddenly summoned thereto instead of having her mind pre-inclined to finding the offender in the Bridges' office. There is nothing on the record to indicate that the appellant was not the only African male working in that office and one of the appellant's main contentions in his defence was that there was a "fitina" between himself and Mr. and Mrs. Bridge his employers and he tendered letters in support of this story relating to the Labour Office's intervention in the alleged "fitina". The appellant might have been a complete liar in respect of this allegation; but his identification apparently conducted by Mr. Bridge, a police officer and Mrs. Kara at Mr. Bridge's company's office was in the circumstances unfortunate particularly when the trial magistrate accepted Mrs. Kara's evidence of identification of the appellant as if he was completely satisfied as to her certainty in this behalf from the three alleged transactions at the store unaffected by the "identification" undertaken at the office in Nairobi. The words of Mrs. Bridge under cross-examination are perhaps unwittingly appropriate in this behalf; she said, – "I believe there was

some kind of identification.” Still on the question of the satisfactory identification of the appellant is the following:

The record of proceedings clearly shows that the appellant expressly raised the defence of alibi. He did this not only in his lay cross-examination of the prosecution witnesses but also in his unsworn statement of defence and I am of opinion that his alibi was by no means trivial. He said that if he left the office in Nairobi (presumably without permission) deduction would be made from his salary. He also pointed out that it would take about an hour to go to Pangani from Government Road Nairobi. If I correctly understand the appellant’s contention he was saying that as telephonist typist it was not possible for him to be away from his post without permission or undetected between 10 a.m. and midday as Mrs. Kara stated; and further there was not a shred of evidence from the prosecution tending to show that he was not at his post during the period and on the days of the alleged offences for had he been in fact away at Pangani this would have been readily known to his employers and fellow employees at the Press. For the above reasons this court is of the view that the charges against the appellant were not proved with that degree of certainty required and that he was on the evidence entitled to the benefit of doubt and to be acquitted.

The appeal is allowed the convictions quashed and sentences set aside.

Appeal allowed.

The appellant was absent and unrepresented.

For the respondent:

D. N. Kibuchi (State Counsel)

Abdul Haji v Tanzania Electric Supply Co Ltd and another
[1970] 1 EA 238 (HCT)

Division:	High Court of Tanzania at Dar-es-Salaam
Date of judgment:	29 September 1969
Case Number:	5/1969 (14/70)
Before:	Hamlyn J
Sourced by:	LawAfrica

[1] *Rent restriction – Standard rent – Reassessment – Change in character – Whether improvements constitute change of character – Rent Restriction Act 1962, s. 4 (2) (ii) (T).*

[2] *Rent Restriction – Standard rent – Reassessment – Improvements made by tenant – Rent Restriction Act 1962, s. 4 (2) (ii) (T).*

Editor's Summary

The appellant landlord applied to the Rent Tribunal, Dar-es-Salaam, for the reassessment of the standard rent of the suit premises. The Tribunal reassessed the rent taking into consideration the sum of Shs. 100,000/- spent by the first respondent on "improvements". After the rent had been fixed by the Tribunal additional evidence was produced to show that the actual amount spent by the first defendant upon the "improvements" was Shs. 400,000/- and not Shs. 100,000/-. The revised figure accounted for a total expenditure on repairs in nine years. The appellant contended that if the Tribunal allowed an additional 14% on Shs. 100,000/- for improvements, when that figure was subsequently adjusted to read Shs. 400,000/- then the additional rent should have been raised four times. The Tribunal however decided that the rent as fixed previously by it should remain as the standard rent of the premises.

The appellant appealed.

Held –

- (i) there had been no change in the character of premises, by reason of improvements;
- (ii) only expenditure incurred by the landlord on improvements or structural alterations could be taken into account as special circumstances;
- (iii) assuming that the expenditure of Shs. 400,000/- had been incurred by the landlord, there was no evidence before the Tribunal on which the sum could be apportioned to repairs, improvements or structural alterations.

Appeal dismissed.

No cases referred to in judgment.

Judgment

Hamlyn J: This is an appeal against the decision of the Dar-es-Salaam Rent Tribunal in respect of the fixing of standard rent of certain premises situate in the city of Dar-es-Salaam. The first respondent has not sought to appear or to argue the case put forward on appeal by the appellant; the second respondent has appeared by counsel, as has also the Chairman of the Rent Tribunal in terms of s. 11 (3) of the Rent Restriction Act 1962.

There is only one point which is canvassed on this appeal and the figures which were before the Tribunal are not in issue. The matter upon which the appellant has come before this Court is the question of the assessment of rent upon the figures stated to have been spent upon “improvements” to the suit premises. It appears that at the original hearing before the Tribunal, a sum of Shs. 100,000/- was taken by the Tribunal to have been spent by the first respondent; subsequently, and after rent had been fixed taking into account such figure, it appeared that some misunderstanding had arisen as to the figure given to the court by the witness concerned. He again appeared before the Tribunal, and, in his additional evidence, stated that a sum of Shs. 400,000/- was the amount spent by the first respondent upon the premises. After further consideration, the Tribunal decided that the rent as fixed previously by it should remain as the standard rent of the suit premises.

The argument of the appellant is simple. What he says is this: If the Tribunal allowed an additional 14 per cent on Shs. 100,000/- for improvements, when that figure was subsequently adjusted to read Shs. 400,000/-, then the additional rent should have been raised four times. This would bring the rent (including the rent on the prescribed date and less rent for the portion retained by the appellant) to Shs. 15,164/- a month, or an additional 14 per cent on the missing Shs. 300,000/-.

It was agreed by the parties and accepted by the Tribunal that the rent at which the premises were let at the prescribed date was Shs. 12,500/- a month, and this figure has been embodied in the Ruling; such basis for calculation arises from the provisions of s. 4 (1) (a) of the Rent Restriction Act. The appellant contends that the Tribunal should have gone further and, on a finding that “special circumstances” were applicable under s. 4 (2) (a), should have allowed a 14 per cent increase on the “improvements” figure of Shs. 400,000/-. The appellant has referred this Court to s. 4 (2) (ii) of the Act, which reads as follows in so far as “special circumstances” are concerned:

- “(ii) Any change in the size or character of the premises, or any expenditure incurred by the landlord on substantial improvements or structural alterations to the premises, other than for ordinary or necessary repair. . .”

and there then follow other matters which do not concern the present appeal.

The appellant argues that there has been a change in “character” of the premises, by reason of improvements, and, further, that the improvements have virtually been “carried out by the landlord” in view of the evidence that the appellant has accepted rent at a lesser amount as a result of the value of the improvements according to him on expiry of the lease.

I do not think that these arguments are altogether valid. In the first place, a change in character of the premises is, I think, a reference to a change in user; that is to say, that where there is a conversion from one user to another – as from business premises to residential or vice versa. Here improvement by addition of air conditioners or parquet flooring being laid, cannot result in a “change in character of the premises”. Certainly, they are improved, but the character remains the same. Nor do I think that the expenditure has been “incurred by the landlord” on the argument that he has accepted a lesser rent from the respondent. On the evidence, the respondent himself has incurred the expenditure; it may be (though there is meagre evidence on the point) that some recompense will be reaped by the appellant in the future, but I take it that the section must be deemed to mean what it says.

The main consideration, however, on which this decision must rest concerns another matter, not argued by the appellant. The witness Owen, in giving evidence, spoke of a sum of Shs. 100,000/- (later revised to Shs. 400,000/-) having been expended by the first respondent on “repairs and alterations”. In his evidence given subsequently on 1 August 1968 (when he revised his original figure of Shs. 100,000/-), he told the Tribunal that a sum of Shs. 400,000/- had been spent by his company “on repairs in nine years”. There is nothing in his evidence to show how this sum can be classified as part repairs and part improvements or structural alterations, and a document on the file of the Tribunal bearing the heading “Inventory of Head Office and Annex Fixtures” does not seem to assist, nor indeed does it seem to be referred to in the evidence.

Section 4 (2) (ii) of the Act defines “special circumstances” which may be taken into account in the fixing of standard rent by the Tribunal under s. 4 (2) (a). Even assuming that this Court could find that the expenditure was incurred by the landlord, it seems impossible for the Tribunal to have made a finding on the evidence before it as to how much of this sum of Shs. 400,000/- consisted of improvements and structural alterations and how much was spent on ordinary or necessary repairs. Had the evidence been somewhat more explicit, the Tribunal could have considered the matter in more detail.

What I think happened in this assessment, and this is to some extent supported by the address of the Chairman of the Tribunal at the hearing of the appeal, is that the figure of Shs. 100,000/- was admitted as a basic figure, though with some reluctance. Thereafter, the figure was amended to Shs. 400,000/-, and the Tribunal refused to allow such figure to enter into its calculations – partly, no doubt, on the assumption that the premises did not warrant acceptance of such figure, and partly because it had nothing before it to show that the sum of Shs. 400,000/- could properly be an assessment of substantial improvements and structural alterations. In acting thus, it was certainly supported by the evidence of the witness Owen, who referred the expenditure to repairs alone; nor is there anything on the record to enable the Tribunal to ascertain on which party lay the responsibility of carrying out repairs; nor is a copy of the lease exhibited.

The Tribunal, therefore, had before it evidence of a very indifferent character. There was, so far as is known, no change in the size or character of the premises; the lack of details of the terms of the lease made it impossible for the Tribunal to have reached any decision as to upon whom the duty to carry out repairs fell, and no information existed in the evidence as to the break-down of the figure of Shs. 400,000/- into improvements, alterations and repairs. In these circumstances, and in view of the fact that the Tribunal had granted a sum of Shs. 100,000/- in its calculations of the rent payable to the appellant, I cannot see the force of the appellant's argument that the final decision should have been calculated on the revised figure of Shs. 400,000/-. There was a lack of proper evidence before the Tribunal upon which it could act, and it is impossible for this Court in appeal to say that the higher figure should have formed the basis for the calculations.

In the event, therefore, this appeal must fail, for the Tribunal had no real basis for calculating the standard rent in the manner sought by the appellant. As a consequence, the appeal is dismissed, and the respondent will have his costs.

Appeal dismissed.

For the appellant:

S. Kanji (instructed by *Fraser Murray, Roden & Co.*, Dar-es-Salaam)

For the respondent:

N. A. Velji (instructed by *Sayani Balsara & Velji*, Dar-es-Salaam)

Farook v Sherali
[1970] 1 EA 241 (HCT)

Division:	High Court of Tanzania at Dar-es-Salaam
Date of judgment:	14 November 1969
Case Number:	25/1969 (16/70)
Before:	Georges CJ
Sourced by:	LawAfrica

[1] *Appeal – Revision – Lack of jurisdiction – Whether judgment of District Court will be set aside.*

[2] *Appeal – To High Court – No certified copy of order appealed from accompanying memorandum of appeal – Appeal incompetent – Civil Procedure Code 1966, O. 39, r. 1 (1) and O. 40, r. 2 (T).*

Editor's Summary

The District Court at Songea while presided over by a resident magistrate made an order for the possession of premises in favour of the landlord. Although there was no jurisdiction to make the order,

no objection had been taken at the hearing. No certified copy of the order appealed from was attached to the memorandum of appeal.

Held –

- (i) the appeal was not properly presented and could not be entertained (*Kotak v. Kooverji* (2) followed);
- (ii) notwithstanding the lack of jurisdiction the court in exercise of its revisional jurisdiction would not in the special circumstances interfere with the decree (*Dayaram Jagjivan v. Govardhandas Dayaram* (1) followed).

Appeal dismissed.

Cases referred to in judgment:

- (1) *Dayaram Jagjivan v. Govardhandas Dayaram* (1904), I.L.T. 28 Bombay 458.
- (2) *Kotak Ltd. v. Kooverji*, [1967] E.A. p. 348.
- (3) *Tadjin Allarakhia v. H.H. Aga Khan*, Civil Case 28 of 1968, Tanzania.

Judgment

Georges CJ: This is an appeal by the tenant from the judgment of the District Court at Songea, then presided over by a Resident Magistrate, ordering him to quit and deliver up to the landlord possession of the suit premises. The landlord's right of occupancy has expired. The Land Officer has served on him a notice to quit and deliver up possession of the plot. To comply with this order he sought vacant possession from the tenant. The tenant admits the facts, but pleads that he has been unable to find other suitable alternative accommodation in Songea. He states that he carries on business on the premises and that he will suffer great hardship if he is forced to move.

The landlord states that this is in fact not true. The business on the suit premises is being run by the tenant's sons and he has two other sons each running his own business in other parts of the township. It appears not to be disputed that the tenant does have two sons with business in the township.

On the facts, it is clear that it was correct that an order for possession should be made. The landlord's right of occupancy having expired he must give up the plot. The evidence is that the area is to be redeveloped and more substantial buildings put up, so that in any event the suit premises cannot continue to exist in their present condition.

Mr. Pardhan has pointed out also that the appeal cannot be entertained since the papers are not in order. A certified copy of the order appealed from has not been attached to the memorandum of appeal. It has been held in *Kotak Ltd. v. Kooverji*, [1967] E.A. p. 348 that an appeal filed without such an order has not been properly presented and cannot be entertained.

I pointed out to Mr. Pardhan, however, that the order appealed from had been made by the District Court whereas the Rent Restriction Act had vested jurisdiction in the Resident Magistrate's Court. In a yet unreported case, *Tadjin Allarakhia v. H.H. Aga Khan*, Civil Case 28 of 1968, Biron, J. held that the District Court had no power to hear an application for vacant possession under the Rent Act even if presided over by a Resident Magistrate. He held:

"The fact that a court is presided over by a magistrate of a particular grade does not ipso facto transform that court into the class of the magistrate's grade. It is expressly provided for in the Act that each class of court shall have its own register and its own prescribed seal. These instant proceedings were heard and tried by the District Court of Dar-es-Salaam, and the order and decree had issued from that court. Therefore, in my judgment despite the fact that the court was presided over by a Senior Resident Magistrate, the trial was in fact held in and the order and decree made by, the District Court of Dar-es-Salaam, which court has, as indicated, no jurisdiction to try such suit."

The question, therefore, arises whether this Court ought not, in its revisionary jurisdiction, to set aside an order which has clearly been made without jurisdiction even though an appeal from that order has not been properly presented and cannot be entertained.

Mr. Pardhan was not able to quote any authority on this matter. It would appear, however, that in the case of *Dayaram Jagjivan v. Govardhandas Dayaram* (1904), I.L.T. 28 Bombay 458, a not dissimilar situation arose. In that case certain property was attached in execution of a judgment obtained in the court of Small Causes Bombay. The defendant applied to have the attachment set aside and succeeded. The plaintiff appealed to the District Court and on appeal

the attachment was restored. The defendant further appealed to the High Court. There, it was admitted that the District Court had no jurisdiction to make an order on an appeal from the removal of an attachment. The order made by the District Court was, therefore, completely without jurisdiction. Since there could have been no appeal in the first place, it followed that the second appeal to the High Court was itself incompetent. The court was, however, asked to exercise its revisional jurisdiction to set aside the order made by the District Court. This the court refused to do on two grounds: (1) that no objection to jurisdiction had been taken at the hearing before the District Court; and (2) that setting aside the proceedings might prejudice the plaintiff who would find himself time barred if he began at that stage to make a fresh start in pursuing his remedies. The High Court allowed the order of the District Court to stand although made without jurisdiction.

It is true that in this case the landlord will not be time barred should he be ordered to begin again in the proper court to enforce his rights. The facts, however, are so clear that only one result can be forecast if the proceedings are commenced again. There will only be delay and additional costs.

Taking this into account and taking into account also the fact that the District Court was presided over by a Resident Magistrate, the class of officer who would have presided had the case been heard in the appropriate court, I would hold that this court ought not to interfere to set aside the decree.

The appeal is dismissed. There will be no order as to costs in this appeal.

Appeal dismissed.

The appellant was absent and was unrepresented.

For the respondent:

M. G. Pardhan

Official Receiver v Sukhdev
[1970] 1 EA 243 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	21 March 1969
Case Number:	423/1966 (1/70)
Before:	Madan J
Sourced by:	LawAfrica

[1] *Civil Practice and Procedure – Originating Summons – Trust – Disputed questions of fact – Should not be determined on originating summons – Civil Procedure (Revised) Rules 1948, O. 36, r. 1 (K).*

[2] *Civil Practice and Procedure – Originating Summons – Issues relating to wilful default and breach of trust – May not be raised – Civil Procedure (Revised) Rules 1948, O. 36, r. 1 (K).*

Editor's Summary

The Official Receiver applied by originating summons for orders against the respondent as executor of a will, that he transfer land to a beneficiary, that he administer the estate and that he render accounts to the court. It appeared that the transfer to the beneficiary was subject to the performance of conditions with which the beneficiary as a bankrupt could not comply. The rest of the application appeared to be based on allegations of wilful default or breach of trust against the trustee, and to involve the administration of the trust.

Held –

- (i) originating summons is not the procedure by which decisions on disputed questions of fact ought to be obtained;

- (ii) it was not competent to obtain on originating summons other than by consent an order founded on breach of trust or wilful default (*Dowse and others v. Gorton and others* (6) followed).

Application dismissed.

Cases referred to in judgment:

- (1) *Re Powers* (1885), 30 Ch. D. 291.
- (2) *Re Carlyon* (1887), 56 L.J. Ch. 219.
- (3) *Re William Davies* (1880), 38 Ch. D. 210.
- (4) *Re Ellis* (1888), 59 L.T. 924.
- (5) *Re Royle* (1890), 43 Ch. D. 18.
- (6) *Dowse and others v. Gorton and others*, [1891] A.C. 190.
- (7) *Nutter v. Holland* (1894), 3 Ch. D. 408.
- (8) *Re Sutcliffe*, [1942] 1 Ch. 453.

Judgment

Madan J: This originating summons under O. 36, r. 1 (*e*) of the Civil Procedure (Revised) Rules 1948, has been taken out by the Official Receiver for the following orders:

1. An order that the Respondent Sukhdev son of Keharchand as personal representative of the said Keharchand son of Inder Singh deceased do forthwith assent to the vesting in the Official Receiver as trustee of the property of Tarachand Kent, a bankrupt, of one hundred acres freehold land out of ALL THAT piece or parcel of land measuring one hundred and fifty acres or thereabouts situate on the old Juja Road in the Nairobi District being land Reference No. 6817(42/2/2/1) more particularly and subject as described in the will dated 11 June 1950, proved in the High Court of Kenya at Nairobi in Probate and Administration Cause No. 3 of 1951, of the said Keharchand son of Inder Singh deceased.
2. An order that the respondent do consent to a subdivision of the said land known as Land Reference Number 6817(42/2/2/1) and that he shall, within such period as this court may direct, take all steps as may be necessary for such purpose, including the obtaining of consents to such subdivision from the appropriate Government authorities, the instructing of a survey of the said land and the execution of all conveyances, assurances and transfers as may be required to give effect to the provisions of the said Will and payment of all costs connected with the said subdivision.
3. If and so far as necessary administration of estate of the said Keharchand son of Inder Singh deceased.
4. An order that the respondent do forthwith render to the court a true account of the property and credits of the estate of the said Keharchand son of Inder Singh deceased in accordance with the undertaking given by the respondent in that behalf in the said Probate and Administration cause No. 3 of 1951.

The respondent filed a notice of objection stating he will object that there is no jurisdiction to make the orders sought on this originating summons because:

- (1) The Official Receiver, representing the general body of creditors (not of the Estate), is claiming adversely to the Estate and/or to the widow of the testator, not a party to this summons:
- (2) The court is asked to administer the Estate by executing the alleged trusts, and not merely to determine

questions without such administration:

- (3) The court is asked to make orders founded either upon an alleged breach of trust, or upon enquiries pointing to an alleged wilful default.

At the hearing of the motion relief number four set out above was abandoned by the applicant in these proceedings.

The facts briefly are that probate of the Will of Keharchand was granted to the respondent as the sole proving executor. Under clause 2 (a) of his Will the deceased bequeathed the following legacy in favour of his son Tarachand, now a bankrupt,: –

“2(a) To my son Tarachand absolutely one hundred acres freehold land out of *All That* piece or parcel of land measuring one hundred fifty acres or thereabouts situate on the old Juja Road in the Nairobi District being Land Reference Number 6817(42/2/2/1) *subject* to the payment of the one-third shares of the principal mortgage amount of shillings Thirty thousand interest accrued thereon and other charges or money for securing the payment of which sums the aforesaid piece or parcel of land together with Land Reference Number 6818, 6829 and 6830 has been mortgaged or charged *and subject* also to the charge with payment of one-third share of the sum of shillings seven thousand two hundred being the annuity payable every year and hereinafter described in paragraph three and *subject* also to the charge with payment of one-third share of the sums mentioned in clause D of this “paragraph being the marriage expenses of each of my two daughters therein referred to *and subject* further also to a right of way of my other two sons, *Sukhdev* and *Ranbir*, sufficiently wide to pass from and to the farms hereinafter bequeathed to them by this Will together with their vehicles animals and other farm implements and their visitors freely and without any obstruction or inconvenience *and I direct* my trustees that for the purposes of giving effect to this my last Will the aforesaid piece or parcel of land being Land Reference No. 6817 shall be partitioned in a North South direction in such a way that the partition shall not effect in any way the present water supply to the aforesaid farm and the adjoining farm being Land Reference Number 6829 and the present arrangement of water supply made by me with the consent of the water Board shall not be varied in any way by my said sons either jointly or individually.”

The 150 acres not having been subdivided to carve out therefrom Tarachand’s one hundred acres it is still registered in the respondent’s name as personal representative of the deceased. The applicant requested for a transfer to him of the 100 acres. The respondent’s advocate on 23 February 1966, replied, I quote the two relevant paragraphs, as follows: –

“the farm in question was devised to Mr. Tara Chand and such devise was according to the will subject to the charges stated in the will referred to by you. Mr. Tara Chand has not, to date fulfilled his obligations under the will and in view of his present status he is not likely to fulfil his obligations. Consequently the transfer to Mr. Tara Chand or to you does not arise.

Until the fulfilment of the obligations by Mr. Tara Chand or the discharge of charges under the will by the devisee and/or by you now, our client, to say the least, has lien over the farm for the moneys expended in accordance with the wishes of the testator.”

In his replying affidavit the respondent admits one hundred acres was devised and bequeathed to Tara Chand “absolutely” and yet at the same time “subject to” or conditionally upon his fulfilling inter alia the stipulations relating to payment of one-third share of the mortgage loan then outstanding on that and other property, the annuity in favour of the testator’s wife, and payment of one-third share of marriage dowries for the testator’s two daughters, which payments, the respondent contends, were charged under the will inter alia

against the 100 acres. The respondent further contends that on the true construction of the will no right has accrued to or become vested to Tara Chand (and his trustee in bankruptcy is in no better position), to call for transfer or partition of the 100 acres in view of the admissions by Tarachand made in his affidavit that on their marriage he did not make any payment towards dowries of his two sisters, and though his mother is still alive he has never paid her anything by way of annuity, which payments, together with payment of sums hereafter mentioned, is a condition precedent to Tarachand or his trustee's right to call for a partition of the 100 acres and a transfer thereof as they constitute a prior charge or a prior equitable lien entitling the respondent to refuse to transfer the land without a tender of the sums due from Tara Chand and charged thereon; it would be against conscience to order a transfer without at the same time the applicant carrying out the bankrupt's contemporaneous obligations in relation to the 100 acres or otherwise under the will. Finally, says the respondent, in the events which have happened and in view of Tarachand's bankruptcy and inability to pay his share (if any) under the will has fallen into residue and devolves upon the mother or it has become subject to distribution as upon the deceased's intestacy. This last contention is presumably a reference to clause 4 of the will whereby to the extent stated therein the testator purported to leave his residuary estate to his widow.

The above mentioned sums due I think refer to the respondent's claim that he and his brother Ranbir have made loans to the estate and the estate in its turn, in anticipation of receiving the same from Tarachand, has paid out his share of the Estate Duty and contributions towards payment of the mortgage debt, the annuity and marriage dowries, on account of which Tarachand was on 31 December 1965, indebted to the estate in the sum of Shs. 45,718/37 upon which interest on the like rate as under the mortgage is equitably due to the estate from Tarachand.

The applicant has not, says the respondent, as a condition of calling for a transfer of the 100 acres offered to pay this sum and interest or to secure continued annuity payments to the mother. The applicant is not in a position to do so and without such provision it would be inequitable to transfer the property to the applicant. Also the proceeds of sale of the 100 acres in the open market which is not expected to realise more than Shs. 50,000/-, will be insufficient to pay off or discharge the charge or prior lien of the Estate against it for the said sum of Shs. 45,718/37-, interest thereon or to secure the continued annuity payments to the mother during her lifetime.

Without meaning or wanting to say, I do not want to be taken as saying, that all the issues contended for cannot be determined on this originating summons, some may not require to be determined at all in these proceedings, for example, whether Tarachand's share has fallen into residue, I have tried to indicate the large field of conflict as portrayed by the disputes between the parties which turn on questions of fact.

On the preliminary objection being moved, Mr. Satish Gautama, counsel for the applicant, to my astonishment, said there must be limit to the number of preliminary objections which a party is allowed to raise, that the respondent had raised two preliminary objections on a previous occasion, and such objections tend to delay the hearing of the substantive subjectmatter. Mr. Gautama overlooked that the objection moved by the respondent is specifically referred to in the respondent's affidavit and this was the first occasion when he could raise it.

I peremptorily rejected Mr. Gautama's submission. It was verbiage. In a court of justice parties are entitled to be heard and to insist upon every possible objection. It would be wrong for this or any court to refuse to hear an objection

even if it appears meritless and tedious. Woe be to the day when this will be allowed to happen. It would be honourable to abdicate from the seat of justice than to allow such a performance of denial to take place.

The court may disallow an objection, reject a motion or refuse a plea but it must never refuse to hear it. A court of law is for the preservation not usurpation of rights of the parties.

The provisions of O. 36, r. 1 to the extent they are enacted seem closely to follow the wording of English O. 55, r. 3. I turn to English authorities for guidance.

In *Re Carlyon* (1887), 56 L.J. Ch. 219, North, J. held the court has jurisdiction to determine upon an originating summons under O. 55, r. 3 such questions only as the court could have determined in an administration action before the Order came into existence. The same learned judge held in *Re William Davies* (1888), 38 Ch. D. 210, that there is no jurisdiction upon an originating summons to decide a question arising between legal beneficial devisees under a Will.

In *Re Royle* (1890), 43 Ch. D. 18, the executor took out an originating summons under O. 55, r. 3 against the other executor and the testator's widow asking inter alia whether a sum of £171 which the testator had handed to his widow shortly before his death, and which stood in her name at a bank, belonged to her or the estate. The widow objected to the jurisdiction as to the £171, but Kekewich, J. overruled the objection, and made an order declaring the sum to be part of the testator's estate. On appeal, held that there was no jurisdiction on originating summons to decide adversely to the widow that the sum belonged to the testator's estate, this not being a matter which could be decided in an administration suit. Cotton, L.J. said, at p. 21:

"Kekewich, J. dealt with this originating summons as giving him jurisdiction to decide adversely to the widow that she was not entitled to this sum of money, but that it belonged to her husband's estate. The summons gave him jurisdiction to decide points relating to the administration of the estate, questions arising between legatees and the executor. This is not a question between the executor and a legatee as such, but a question between the executor and a person who holds money which he alleges to belong to the estate of the testator, and which she alleges to be her own. In an administration suit the regular course would have been, after directing accounts of the personal estate, to add a special inquiry whether this sum of money had been given to the widow."

Cotton, L.J. went on to say if the widow did not submit to the jurisdiction to have the question tried under the inquiry there would be no jurisdiction to decide adversely against her in the administration action that she was not entitled to the money.

The other two members of the Court of Appeal concurred. Bowen, L.J. said the case was one which could not be decided on originating summons adversely and without consent, that it did not come under O. 55, and added there was no jurisdiction in the present case.

Fry, L.J. said, at p. 22, O. 55 was not intended to give jurisdiction except as to matters which could be decided in an administration action and added: "I entirely agree with the view taken by North, J. in *Davies* (*supra*)."

In *Nutter v. Holland* (1894), 3 Ch. D. 408, Lopes, L.J. said at p. 410, he agreed with what Lindley, L.J. said in *Re Powers* (1885), 30 Ch. D. 291, that is, a summons is not the proper way of trying a disputed debt where the dispute turns on questions of fact.

In *Re Powers*, which was a case dealt with under O. 55, r. 10, Cotton, L.J.

also said it is true that it is not the right course to take out an administration summons to obtain payment of a disputed debt, where the dispute turns on matters of fact.

In *Dowse and others v. Gorton and others*, [1891] A.C. 190, Lord Macnaghten said, at p. 202:

“And, indeed, I apprehend it would not be competent for an applicant on an originating summons to ask for or obtain otherwise than by consent an order founded on breach of trust or inquiries pointing to wilful default.”

In *Re Ellis*, 59 L.T. 924, an originating summons was taken out by two beneficiaries under a settlement asking that notwithstanding a release which had been executed to the trustees, they the trustees might be ordered to render an account of the trust funds: thus in effect claiming to have the release set aside. The respondents objected to having the case heard on affidavit evidence. Kay, J., said he was clearly of the opinion that this was not a case which should be heard on an originating summons. In *Re Sutcliffe*, [1942] 1 Ch. 453, Bennett, J., adopted a similar opinion, at p. 455, that an originating summons is not the procedure by which decisions on disputed questions of fact ought to be obtained.

In Underhill’s Law of Trusts and Trustees (11th Edn.), it is stated at pp. 537 and 538, “it is generally inadvisable to employ an originating summons for hostile proceedings against a trustee, and this procedure is, of course, quite unsuitable where the facts are in dispute as the evidence is by way of affidavit.” Earlier at p. 534, the author in attempting to give the effect of O. 55, r. 3 (a) as construed by the court states an originating summons may be taken out for relief but excluding hostile claims against the trustees for wilful default of any other breach of trust where the facts are in dispute.

As an example, one of the disputes referred to in the respondent’s affidavit seems to fall clearly within the words of the judgment of Cotton, L.J. in *Re Royle* (*supra*), which Mr. Gautama said he accepts, i.e., the respondent’s contention that he and his brother Ranbir have made loans to the estate, which is not a question between the respondent as trustee of the estate and Tarachand the legatee as such, but a question between the estate and the respondent personally who alleges the money lent by him is repayable to him by the estate, and the estate in turn is to be reimbursed by Tarachand. How could such question of disputed facts be satisfactorily decided on affidavit evidence alone!

As another example, is the applicant entitled to call for a transfer of the 100 acres without fulfilling the obligations under which the same was left to Tarachand! A question of law may be decided on originating summons in *Re Powers* (*supra*), but it would be both inadvisable and unsatisfactory, the court may find itself presented with an incomplete picture, to do so when the question is mixed up with several other questions the answer or answers to which can only be reached after determining a mass of facts in dispute; it is precluded from doing so when there is no consent submitting to jurisdiction. This leads me on to say the orders asked for are founded upon breach of trust or wilful default. The judgment of Lord Macnaghten (*supra*), which with respect I do not wish to differ from, I think prohibits the applicant from succeeding.

For the reasons I have stated the application is dismissed with costs. I would give a certificate for two advocates.

Application dismissed.

For the applicant:

S. C. Gautama and Njenga

For the respondent:

Motokov v Auto Garage Ltd and others
[1970] 1 EA 249 (HCT)

Division: High Court of Tanzania at Dar-es-Salaam
Date of judgment: 15 September 1969
Case Number: 46/1966 (15/70)
Before: Georges CJ
Sourced by: LawAfrica

[1] *Arbitration – Stay of proceedings – Arbitration clause in contract – Whether stay will be granted – Principles – Arbitration Ordinance (Cap. 15), s. 6 (T).*

[2] *Arbitration – Stay of proceedings – Arbitration clause in contract – Whether application to court a step in the proceedings – Arbitration Ordinance (Cap. 15), s. 6 (T).*

[3] *Arbitration – Agreement – Ouster of jurisdiction of court – Whether agreement valid.*

[4] *Civil Practice and Procedure – Stay of proceedings – Arbitration clause – Whether application to court a step in proceedings – Arbitration Ordinance (Cap. 15), s. 6 (T).*

Editor’s Summary

The plaintiff sued the defendants on bills of exchange. The second and third defendants had guaranteed the bills in consideration of the plaintiff’s supplying motor vehicles to the first defendant. The defence alleged that the first defendant had been induced to enter into the contract by fraudulent misrepresentations. There was a counterclaim for breach of contract. The plaintiff filed a summons asking for further and better particulars of the defence, and in January 1967 obtained an order on it. Two years later, in February 1969, the plaintiff applied to have the counterclaim stayed on the ground that the issues raised by the counterclaim ought to be referred to arbitration as stipulated in the contract. The arbitration clause required all disputes arising out of the contract to be settled through an arbitration appointed under and in accordance with the Rules of the Court of Arbitration of the Chamber of Commerce of Czechoslovakia. The defence objected to the stay on the grounds (a) that the arbitration clause was void against public policy as it ousted the jurisdiction of the court; and (b) that within the meaning of s. 6 of the Arbitration Ordinance the plaintiff had taken a “step in the proceedings”, and was therefore debarred from asking for a stay.

Held –

- (i) submission to a foreign arbitrator did not of itself constitute an ouster of the jurisdiction of the Court. Consequently the submission was valid;
- (ii) any application to a Court for an order in respect of the proceedings in a “step in the proceedings” within s. 6 of the Arbitration Ordinance. However, the plaintiff had taken the “step” only in

relation to the defence, and therefore was not barred from asking for a stay of the counterclaim;

- (iii) the plaintiff had not repudiated the contract by not suing under it because he had sued on bills of exchange;
- (iv) a stay would be refused because the facts that the defence and the counterclaim were so inextricably mixed there was a substantial risk that two tribunals could reach conflicting conclusions; the plaintiff had chosen to sue in the court despite the availability of arbitration; and the plaintiff had delayed applying for a stay.

Application dismissed.

Cases referred to in judgment:

- (1) *Chappell v. North*, [1891] 2 Q.B. 252.
- (2) *Jureidini v. National British and Irish Millers Insurance Co. Ltd.*, [1915] A.C. 499.
- (3) *Norske Atlas Insurance Co. Ltd. v. London General Insurance Co. Ltd.* (1927), 43 T.L.R. 541.
- (4) *Heyman v. Darwins Ltd.*, [1942] 1 All E.R. 337.
- (5) *Halifax Overseas Freighters Ltd. v. Rasno Export*, [1958] 2 Lloyd's Rep. 147.

Judgment

Georges CJ: This is an application by the plaintiff in these proceedings to have a counterclaim by the first defendant stayed on the ground that the issues raised by the counterclaim are issues which ought to be referred to arbitration under an arbitration clause in the contract between the first defendant and themselves.

The plaintiff's claim was for sums due under Bills of Exchange drawn by the plaintiff on the first defendant and accepted by it. It was alleged that the second and third defendants had guaranteed the bills in consideration of the plaintiff's selling goods on credit to the first defendant.

The defence set out denials of various allegations in the plaint. It also raised certain technical objections. It then went on to allege that the bills of exchange had been given in consideration of the plaintiff's supplying motor vehicles to the first defendant, that there had been representations by the plaintiff that these vehicles would be merchantable and that the first defendant had been induced to enter into the contracts because of these representations. In fact the vehicles had not been merchantable because of a number of itemised defects. By reason of these misrepresentations which the first defendant alleges had been fraudulently made the first defendant had suffered damage as he had been unable to resell the vehicles or could do so only at a substantial loss. The first defendant was therefore not liable. The facts alleging misrepresentation and loss were then repeated as a counterclaim and damages claimed in the sum of Shs. 225,670/- with interest.

On 3 December 1966 the plaintiff filed a summons asking for further and better particulars of the written statement of defence. The exact nature of the particulars sought is not important. The summons came on for hearing in January 1967. The plaintiff, by its advocate, appeared and argued. A ruling was delivered on 31 January 1967 ordering that the particulars be delivered.

A number of adjournments, by consent, followed until the summons now under consideration was filed in February 1969.

The arbitration clause reads as follows:

"All disputes arising out of this contract will be settled amicably. In default of such settlement, the said disputes will be finally settled under the Rules of the Court of Arbitration of the Chamber of Commerce of Czechoslovakia by one/three arbitrator/arbitrators appointed in accordance with these Rules. The parties to the contract undertake at the same time to execute, without delay, the arbitrator's award."

The contract also provided that, except as regards one matter, Czechoslovak law should govern all business deals and/or the legal relations arising out of them.

It would be more convenient to consider this matter from the point of view of the objections raised by the respondent to the grant of a stay.

The first was that the arbitration clause was unenforceable and void as it ousted the jurisdiction of the Court and that was against public policy. It was argued that on any reading of the clause such ouster was clear. I cannot agree. The clause does not even go so far as to say that no action could be brought under the contract until an award had been made by the arbitrator. Such clauses have been held good. It merely provides that disputes should be settled by arbitration. It does not specify, as it would seem to have been suggested, that the arbitration should take place in Czechoslovakia. It merely provides that disputes should be settled under the Rules of the Chamber of Commerce of Czechoslovakia by arbitrators appointed under these Rules. There is nothing on the face of it to establish that arbitrators could not be appointed here.

Even if there had been submission to a foreign arbitrator this could not of itself constitute an ouster of the jurisdiction of the Court to make the clause invalid.

In *Norske Atlas Insurance Co. Ltd. v. London General Insurance Company Ltd.* (1927), 53 T.L.R. 541 the contract document, a Reinsurance Contract, contained an arbitration clause providing that if any dispute should arise under the contract, the parties should not resort to any Court of Law, but that arbitrators should be appointed, who should be chairmen or directors of marine insurance companies in Norway, and if either party should fail to appoint the arbitrator the chief officer of the maritime court of Christina should appoint.

When disputes arose the defendants refused to appoint an arbitrator. The plaintiff had one appointed under the terms of the arbitration clause. This arbitrator made an award which the plaintiff successfully enforced in the English Courts. It was not even suggested in the course of proceedings that the clause was invalid because it ousted the jurisdiction of the Courts.

The clause under consideration here does not go as far, and in my view is perfectly valid.

It was also argued that the plaintiff had taken a step in the proceeding and was therefore debarred from asking for a stay. The power of the Court to grant a stay is set out in the Arbitration Ordinance (Cap. 15), s. 6. This reads:

“Where any party to a submission to which this Part applies, or any person claiming under him, commences any legal proceedings against any other party to the submission or any person claiming under him, in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance, and before filing a written statement, or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.”

The term “step in the proceedings” is not easy to define. Mr. Lakha contended that it connoted a move which carried the proceedings further ahead. For that reason an application to obtain information so that a decision could be made as to what the next move should be could not be described as a “step in the proceedings”. He argued that a plaintiff who was sued under an alleged contract which was not very clearly pleaded may well have to file a summons for particulars to discover whether the contract claimed on is one which contains an arbitration clause which could be the basis of an application for a stay. The argument is

attractive but not entirely convincing. A step is no less a step because it is sideways rather than forward. In any event it could be said that an application for particulars is a step forward because it brings the proceedings nearer to completion – to the point where the action will be ready for trial.

There is a possibility that a wily plaintiff could plead a contract vaguely enough to lure the defendant into a request for particulars, refuse to supply them in order to force an application to the court, and then claim that the defendant had taken a “step in the proceedings”. The problem is more hypothetical than real. It is unlikely that a contract could be so vaguely pleaded as not to be identifiable as one which contains an arbitration clause on which an application for the stay of the proceedings could be based.

I would hold that any application to a Court for an order in respect of the proceedings can be described as a step in the proceedings.

In *Chappell v. North*, [1891] 2 Q.B. 252 the respondent in argument urged that steps must mean steps which advance the proceedings and suggested that a mere summons for particulars would not be such a step. In that case there had been a summons for particulars of a counterclaim. Wills, J. was of the view that:

“the summons for particulars of the counterclaim was a step taken in those proceedings; and that consequently, had nothing else supervened the summons would have been sufficient to take away the jurisdiction of the Court.”

With this view, I agree.

This is not, however, the end of the matter. Mr. Lakha has argued that the particulars requested were of the written statement of defence and not of the counterclaim. It could not be said, therefore, that a step had been taken in the proceedings. Section 6, as drafted, refers only to the situation in which a defendant seeks a stay on a claim filed by the plaintiff. It is also applicable to a plaintiff seeking stay of a counterclaim. In such a case the proceedings begin with the counterclaim and a step must be a step in relation to that. Not all matters pleaded in defence are necessarily repeated as a basis for a counterclaim. In this case particulars were requested of para. 8 of the written statement of defence – a paragraph which was not incorporated in the counterclaim. I would agree, therefore, that the “step” had been taken in relation to the defence and not in relation to the counterclaim and consequently that the jurisdiction of the Court to order a stay had not been ousted.

The respondent has also argued that since the written statement of defence challenges the whole basis of the agreement between the plaintiff and itself then the agreement itself could not be regarded as effective so that there could be no question of enforcing an arbitration clause in it. I find this argument difficult to grasp. Where a plaintiff has clearly repudiated an agreement it may not be open to him to rely on an arbitration clause contained in that very agreement. Here the plaintiff has not repudiated the agreement. He has not sued under it because he was the holder of Bills of Exchange in respect of which he could sue as well.

The case of *Jureidini v. National British and Irish Millers Insurance Company Ltd.*, [1915] A.C. 799 does not support the respondent’s contention. In that case the appellant made a claim under a fire policy which the respondents resisted on the ground that the claim was fraudulent as the loss was based on the felonious acts of the appellants. The appellants sued in Court. The jury found that the claim was not fraudulent whereupon the trial judge entered judgment for the plaintiff in the sum found to be the amount of the loss. The respondents appealed. There was a clause in the contract that if any difference

arose as to the amount of any loss such difference should, independently of all other questions, be referred to arbitration, and that it should be a condition precedent to any right of action upon the policy that the award of the arbitrator or umpire of the amount of the loss if disputed, should be first obtained. The respondents argued that the trial judge was wrong in entering judgment for the amount of the loss since there had been no arbitrator's award. The Court of Appeal upheld the contention. In the House of Lords the decision was reversed. Viscount Haldane expressed the principle thus:

“when there is a repudiation which goes to the substance of the whole contract I do not see how the person setting up that repudiation can be entitled to insist on a subordinate term of the contract still being enforced.”

The plaintiff here is not “the party setting up that repudiation” and the principle is not applicable. Mr. Lakha has pointed out that in *Heyman v. Darwins Ltd.*, [1942] 1 All E.R. 337 the House of Lords cast doubt on the wide principle enunciated by Viscount Haldane and concluded that the *Jureidini* case had been decided on the narrower ground that the arbitration clause in that case dealt only with disputes as to the amount of a loss and not with disputes as to the validity of a claim. This objection to the grant of a stay cannot succeed.

One matter remains for discussion. Section 6 gives the Court the power to grant a stay if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission.

Mr. Lakha argues that this places the onus on the respondent – that prima facie once the conditions earlier specified are shown to exist it is up to the respondent to show why the stay should not be granted. He urges that the affidavit filed by the respondent discloses no such ground and that accordingly he should have his stay. I do not think the Court is limited strictly to the points set out in the respondent's affidavit. The proceedings in their entirety are before the Court, and perusing them, the Court is to decide whether or not it is satisfied that the power should not be exercised.

The plaintiff has chosen to sue in this Court instead of pursuing arbitration under the agreement which was equally open to him. The defence raises issues of misrepresentation and breach of warranty which form the foundation of the counterclaim. If a stay is not granted there is a substantial risk that two tribunals might reach conflicting conclusions on the facts. The Courts here may hold that the defences of breach of warranty and misrepresentation were established and reject or reduce the plaintiff's claim while the arbitrators appointed to deal with the matters raised in the counterclaim may hold that misrepresentation and breach of warranty had not been established. The possibility of conflicting decisions of fact being reached by different tribunals is a legitimate factor to be taken into consideration in deciding whether a stay should be granted or not.

Halifax Overseas Freighters Ltd. v. Rasno Export, [1958] 2 Lloyds Law Rep. 147.

The defences and the counterclaim are so inextricably mixed that it is obviously more convenient to have both of them decided together in one set of proceedings in a forum selected by the plaintiff despite the availability of arbitration.

When there is added to this the long delay of almost two years in making this application I am satisfied that even if the plaintiff is ready and willing to have the matters raised in the counterclaim decided by arbitration a stay should not be granted in this case.

Accordingly stay is refused. The applicant will pay to the respondent the taxed costs of this application.

Application dismissed.

For the plaintiff:

A. A. Lakha (instructed by *Fraser Murray, Roden & Co.*, Dar-es-Salaam)

For the defendant:

R. C. Kesaria

Oddo v Republic
[1970] 1 EA 254 (HCT)

Division:	High Court of Tanzania at Dar-es-Salaam
Date of judgment:	10 September 1969
Case Number:	504/1969 (18/70)
Before:	Georges CJ
Sourced by:	LawAfrica

[1] *Criminal Law – Wrongful confinement – Justice of the Peace unable to arrest suspect of a non-cognizable offence – Magistrates Courts Act (Cap. 537), s. 47 (T) – Criminal Procedure Code (Cap. 30) (T).*

[2] *Criminal Law – Wrongful confinement – Remand in custody – May be made only when initial confinement is lawful and a case file opened and charge and particulars recorded – Magistrates Court Act (Cap. 537), s. 50 (T).*

[3] *Criminal Law – Judicial officer – Exemption from criminal liability – Whether acts judicial – Penal Code, s. 16 (T).*

Editor's Summary

The appellant a Divisional Executive Officer and Justice of the Peace was convicted in the District Court of wrongful confinement. The appellant placed one Ahmed in the Primary Court lock-up for three days allegedly suspecting the latter of operating an unlicensed shop. No charge was laid against Ahmed, nor was a case file opened. The appellant appealed to the High Court on the ground that as an ex-officio Justice of the Peace, in the absence of a magistrate, he had power to confine any suspect.

Held –

- (i) a Justice of the Peace may not arrest without a warrant unless the offence committed is a

cognizable offence. In this case the alleged offence was not a cognizable offence;

- (ii) the power to remand in custody a person arrested only arises when the initial confinement was lawful;
- (iii) for a remand in custody to be lawful it is mandatory that a case file is opened and the charge and particulars thereof are recorded;
- (iv) in arresting without a warrant the appellant was not acting as a judicial officer and so was not protected by the Penal Code, s. 16.

Appeal dismissed.

No cases referred to in judgment.

Judgment

Georges CJ: The appellant in this case was charged with wrongful confinement, c/s 253 of the Penal Code. It was alleged that between 28 February and 3 March 1969 he had wrongfully confined one Ahmed Mohamed by having him placed in the Primary Court lock-up for 3 days. The appellant was a Divisional Executive Officer, fairly recently

appointed at the date of the incident which led to this charge. It appears that he suspected Ahmed of carrying on a shop without having obtained the appropriate licence under the Trade Licensing Ordinance (Cap. 208). He despatched a messenger to bring Ahmed to his office and after questioning ordered the messenger to imprison Ahmed in the lock-up. This the messenger did, at the same time entering Ahmed's name in the lock-up register. The next day, appellant ordered the messenger to let Ahmed out of the lock-up but not to allow him to go home. Ahmed remained in the vicinity, sleeping in a nearby house until the 3rd when he was eventually permitted to go. The evidence is not clear as to whether or not the Primary Court Magistrate at Kimande was at his court at the time of this incident. On the whole it would appear that he was not.

No charge was ever laid against Ahmed in respect of the offence for which he had been locked up. When he was released he made a report to the police and as a result of this report the appellant was charged with this offence. His defence was that as a Divisional Executive Officer he was an Ex-Officio Justice of the Peace by virtue of s. 45 of the Magistrates' Courts Act (Cap. 537). He had authority, therefore, in the absence of a magistrate to confine the complainant as he had done. The District Magistrate convicted the appellant and imposed a fine of Shs. 400/- with an alternative of 6 months' imprisonment.

In his memorandum of appeal the appellant re-states his argument that as a Divisional Executive Officer and Justice of the Peace he was entitled to confine Ahmed in the absence of the magistrate. He explained the failure to open a case file by saying that all the court documents had been locked up in the magistrate's absence and so he was unable to get them. He complained also that the District Magistrate had not permitted him to lead evidence to substantiate his charge that Ahmed had in fact been trading without licence.

It is convenient to deal first with this last complaint. The Magistrates' Court Act (*supra*), s. 47 provides:

"A Justice of the Peace may arrest or may order any person to arrest any person who in his view commits a cognizable offence."

This power is exercisable whether or not there is a magistrate in the District. It would appear to me that this could have been the only authority under which the appellant could have been acting in this case though from his memorandum of appeal the inference is that he may have been acting under s. 50 (b) which I shall examine later.

The expression "cognizable offence" is defined in the Criminal Procedure Code (Cap. 20) as: –

"an offence for which a police officer may, in accordance with the first schedule hereto or under any law for the time being in force, arrest without a warrant."

The offence of trading without a licence is not specifically listed in the first schedule. It falls, however, under the general classification in Division X, Part B, which deals with "Offences under laws other than the Penal Code". This provides that where the offence is punishable with imprisonment for less than a year or with a fine only a policeman may not arrest the offender without a warrant. The penalty provided for trading without a licence c/s 3 of the Trades Licensing Ordinance (Cap. 208) is "a fine not exceeding five hundred shillings" and "a further fine of twenty shillings for each day or part of a day subsequent to conviction during which the contravention continues". The offence which Ahmed may have committed was not a cognizable offence and the appellant would not have had the power to arrest him without a warrant –

even if it could be established that he had committed the offence. I agree with the District Magistrate, therefore, that evidence tending to establish the fact that Ahmed had committed an offence, was irrelevant for the determination of the charge before him and inadmissible.

As I have already indicated the appellant appears to be justifying the arrest not under s. 47 but under s. 50 (b). This authorises a Justice of the Peace to:

“remand in custody any person arrested with or without a warrant for a reasonable time not exceeding 7 days.”

It may well be that this section cannot in any event cover the facts of this case since the cause of the unlawful confinement was the appellant’s order to the messenger to arrest without a warrant a person who had not committed any offence for which arrest without a warrant was permissible.

Even if it could apply it is not available to the appellant in the circumstances of this case. There is a proviso to s. 50 (b) which reads as follows:

“A justice shall not remand any person in custody unless a case file is, or shall have been, opened for the matter and a charge is, or shall have been, drawn up and signed by a magistrate, justice or police officer, containing such particulars as are reasonably necessary to identify the offence or offences, including the law and the section, or division other division thereof, under which the person is charged.”

The power to remand cannot be exercised unless the conditions laid down in this proviso are fulfilled. In this case no case file was opened, nor was any charge signed either by the appellant, or a magistrate or a police officer. The fact that the court documents were under lock and key and unavailable, cannot be regarded as an excuse for non-compliance with this proviso. In a case where it is necessary one would not have to wait for a printed case file in order to lay a charge against an accused person. Any blank sheet of paper could be used to set out the particulars of the offence as required under the proviso and this could be signed by the appropriate officer. In such a case the requirements of the section would have been fulfilled. The appellant’s failure to obey the rules laid down in the Ordinance as a pre-condition to his exercise of this power to remand, makes his use of that power unlawful.

I have also considered whether or not the appellant can claim immunity by reason of s. 16 of the Penal Code, which provides:

“Except as expressly provided by this Code, a judicial officer is not criminally responsible for anything done or omitted to be done by him in the exercise of his judicial functions, although the act done is in excess of his judicial authority or although he is bound to do the act omitted to be done.”

In some circumstances a justice of the peace does act as a judicial officer. In others his functions are executive rather than judicial. In this case involving the arrest of an alleged offender without a warrant his functions are executive rather than judicial and accordingly the immunity provided by s. 16 does not avail. Accordingly the appeal against conviction is dismissed.

The appellant complains that the fine of Shs. 400/- imposed is excessively heavy. There is no evidence on the record as to the appellant’s salary. It was stated on his behalf, in mitigation, by the Probation Officer that he was 32, married with five children, two of whom were at school. The last child was born a month ago before the conviction. On the other hand, there is far too great a tendency to exercise authority by imprisoning people in circumstances where it is clearly completely unnecessary. Administrative officers should bear in

mind that part of their duties consist of protecting the citizens of this country and increasing their freedom. Even if Ahmed in this case had committed the offence it would have been the simplest thing to have brought him to court and to have had him charged without arresting him. It is extremely uncomfortable and very humiliating to be compelled to spend a night in the lock-up and for this abuse of authority the appellant must be fairly seriously punished. On the other hand it was unreasonable for the magistrate not to allow the appellant time to pay the fine. Shs. 400/- is a substantial sum and it cannot be expected that a person in the appellant's position would be able to produce it at a moment's notice.

My enquiries reveal that Divisional Executive officers by large earn about Shs. 500/-. If this is so, I would not say that a fine of Shs. 400/- is not excessive. I would, however, vary the punishment to a fine of Shs. 100/- with compensation to Ahmed in the sum of Shs. 300/-. In default of payment of the fine the appellant will go to prison for 3 months. In default of payment of compensation there will be distress. Save for this variation the appeal is dismissed.

Appeal dismissed

The appellant was unrepresented.

For the respondent:

J. C. Desouza (State Attorney, Tanzania)

Lui v Republic
[1970] 1 EA 257 (HCT)

Division:	High Court of Tanzania at Dar-es-Salaam
Date of judgment:	26 September 1969
Case Number:	387/1969 (19/70)
Before:	Georges CJ
Sourced by:	LawAfrica

[1] *Criminal Law – Resisting arrest – Refusal to leave dock – Offence not constituted by resistance and disturbance while in custody – Penal Code, s. 243 (T).*

[2] *Criminal Law – Disobedience of lawful order – Verbal order to leave dock – Whether offence committed – Penal Code, s. 124 (T).*

Editor's Summary

After the magistrate before whom he appeared had fixed his bail, the appellant refused to leave the dock when ordered to do so by the magistrate. He resisted removal and created a disturbance which interrupted court business. He was convicted of contempt of court, disobeying a lawful order and resisting arrest.

Held –

- (i) the order was duly made by the magistrate and the appellant rightly convicted of disobeying it;
- (ii) since the appellant was in custody and did not seek to escape his refusal to leave the dock and the resistance could not be described as resisting arrest.

Appeal allowed in part.

Cases referred to in judgment:

- (1) *R. v. Ndede Okaya and others* (1940-41), 19 K.L.R. 98.
- (2) *Salehe Alamas v. Republic*, Law Report Supplement No. 1 dated 14.1.66. Tanzania.

Judgment

Georges CJ: The appellant in this case was charged with three offences against the Penal Code; contempt of court c/s 114 (c), disobeying a lawful order c/s 124 and resisting arrest c/s 243 (b).

The evidence disclosed that on 10 March 1969 the appellant appeared before the Senior Resident Magistrate Dar-es-Salaam in another criminal matter which was for mention that day. The Senior Resident Magistrate fixed a bail for him with a surety. The appellant said that he should be released on signing his own bond. The Senior Resident Magistrate would not agree to this. Having dealt with the matter the Senior Resident Magistrate asked the appellant to leave the dock, intending no doubt to deal with the next matter. The appellant refused to leave. The Senior Resident Magistrate asked the orderlies to remove him. He resisted, and caused a disturbance. It was no longer possible to continue the court proceedings and the magistrate rose. At that stage the police officer in charge of the court summoned other police officers and the appellant was eventually subdued and removed.

When called upon to give evidence the appellant did not put forward any serious defence on the facts. He was convicted on all counts. On the count of contempt he was sentenced to 6 months' imprisonment, on the disobedience of a lawful order to 18 months and on resisting arrest to 18 months, all the terms to run concurrently.

Mr. D'Souza who appeared for the Republic in this matter did not support the convictions on counts 2 and 3. He supported the conviction on count 1, the count for contempt. The particulars to the count of disobeying a lawful order allege that the appellant had –

“disobeyed a lawful order given to him by the Senior Resident Magistrate Mr. Osakwe to wit he was ordered to go to remand vide CC.336/69 but he refused.”

Section 124 under which the appellant was charged reads as follows:

“Everyone who disobeys any order, warrant or command duly made, issued or given by any court, officer or person acting in any public capacity and duly authorised in that behalf, is guilty of a misdemeanour and is liable unless any other penalty or mode of proceeding is expressly prescribed in respect of such disobedience to imprisonment for two years.”

Mr. D'Souza's contention was that the Senior Resident Magistrate had not made any order within the meaning of the section. Similar sections can be found in the Penal Codes of Uganda and Kenya, but it does not appear that there has yet been any serious consideration of the scope of the section. There is no similar section in the Indian Code. I have been able to discover only one case decided in Kenya in 1941 – *R. v. Ndede Okaya and Others* (1940-1941), 19 K.L.R. 98. In that case it was held that an accused person who had disobeyed the summons to attend at the hearing of this matter, was guilty of an offence against s. 117 of the Penal Code of Kenya, the section which then corresponded to s. 124 of our Penal Code. There was no discussion of the meaning of the term “order” but the learned judge held that quite clearly the “summons was an order within the meaning of the section and disobedience of it was an offence”. He held also that the fact that a warrant could have been issued to compel the attendance of the accused person was not any other “mode of proceeding” within the meaning of the section which would prevent its application. In considering the matter the Court stated that it was:

“A fallacy to say that because a person who disobeys a summons in respect of a particular offence is apprehended and brought before a court on a warrant that the offence of disobedience is thereby purged.”

On this point the trend of authority in Tanganyika is different. Although s. 124 itself has not been considered it has been held by Saidi, J. in *Salehe*

Alamasi v. Republic, Law Report Supplement No. 1 dated 14.1.66, p. 19 that failure by an accused person to appear to a court in answer to a summons was not a breach under s. 117 (b) of the Penal Code the contempt section, the learned judge held that s. 101 of the Criminal Procedure Code was a specific provision of the law prescribing the mode of dealing with an accused person who disobeys a summons to appear personally.

It is clear, however, from *Ndede's* case that the court conceived that the widest possible interpretation should be put on the words of the section of Kenya Penal Code which corresponds to s. 124 of our Penal Code. Mr. D'Souza has argued that the section should be restrictively interpreted. I understood him to urge in effect that the word "order" could be restricted in its meaning to formal orders of the court in which case asking an accused person to leave the dock so that following matter could be dealt with would not be an "order" within the meaning of the section. I am myself sympathetic with this approach as it is in the nature of things desirable to define with strictness conduct which can be characterised as a breach of criminal law. To place a wide meaning on the three words, order, warrant or command could lead to repressive use being made of the section.

It seems, however, difficult to formulate an interpretation of the section which is both restrictive and logical. It would appear to me for example, that the word "order" is linked grammatically in the section not only to court, but also to any "officer or person acting in a public capacity". If that is so then, clearly, the word could not be restricted to mean formal orders made by a court. On the other hand, the use of the words "duly made, issued or given" would seem to involve rather more formality than is usually associated with oral commands. It may be urged that these words in some cases bring in the concept of promulgation contained in s. 188 of the Indian Penal Code (Act 45 of 1860), to which Mr. D'Souza referred me as being probably the section most analogous with s. 124 of our Code. The fact is, however, the word promulgation has not been used. It could be said that a command is duly given at the very moment when it is spoken, so that if the person giving the command is authorised to do so then disobedience to it falls within the meaning of the section. I would hold, therefore, that the appellant did commit an offence against the section and was rightly convicted.

I agree with Mr. D'Souza, however, that the facts did not support the conviction for resisting arrest. The appellant was at all times in custody. He had been brought before the court in custody and he had been remanded in custody. He did not seek to escape. What he did was to refuse to leave the court. In effect force had to be used to remove him while in custody from one place to another. I do not think that this can be described as resisting arrest. Accordingly the conviction on the third count must be set aside and the sentence quashed.

Although I have confirmed the conviction on the second count, I am satisfied that it is to a large extent a duplication of count 1 – the contempt count. The appellant's offence was really creating a disturbance in court, by refusing to leave. The maximum penalty provided for offences under s. 114 is 6 months' imprisonment or a fine of Shs. 500/-. Although the acts of the appellant in this case appear to fall under s. 124 as well I do not think that as severe a penalty as 18 months' imprisonment ought to have been imposed in respect of that offence. Accordingly I shall vary the sentence of 18 months imposed in respect of count 2 to a sentence of 6 months' imprisonment to run concurrently with the sentence on count 1 which I also confirm.

Appeal allowed in part.

Appellant unrepresented.

For the respondent:

J. C. Desouza (State Attorney, Tanzania)

Njani v Republic
[1970] 1 EA 260 (HCT)

Division: High Court of Tanzania at Arusha
Date of judgment: 29 November 1968
Case Number: 157 and 158/1968 (20/70)
Before: Platt J
Sourced by: LawAfrica

[1] Criminal Practice and Procedure – Joint offenders – Whether judgment can stand against joint offenders when no joint theft proved.

[2] Criminal Practice and Procedure – Plea – Accused charged with house-breaking and theft – All particulars of charge not admitted – Whether accused's retracted plea could be basis of conviction.

[3] Criminal Practice and Procedure – Plea – Whether acceptance of equivocal plea constitutes ground for quashing conviction.

[4] Criminal Practice and Procedure – Plea – Whether an admission in a plea to one count can be used as evidence on another count.

Editor's Summary

The appellants were jointly charged and convicted, on two separate counts, of housebreaking and stealing. The particulars of the second count were that the appellants having entered the house had stolen two mattresses and a lion skin therein. The second appellant pleaded guilty on the second count. The first appellant denied that he had broken into the house but admitted that he had stolen the mattresses when he had found them elsewhere. There was evidence that the house was broken into.

Held –

- (i) the magistrate was right in holding that the second appellant was guilty not only of the theft but also of housebreaking on the basis of the appellant's plea on the second count and the fact that the house was broken into;
- (ii) on the evidence before the magistrate the first appellant could have been convicted only by theft by finding;
- (iii) since no joint theft was proved the appellants could not be convicted jointly. (*R. v. Scaramanga* (1) followed.)

First appellant's conviction quashed and a retrial ordered.

Second appellant's appeal dismissed.

Cases referred to in judgment:

(1) *R. v. Scaramanga*, [1963] 2 Q.B. 807.

Judgment

Platt J: The appellants John Njani Lembaye and Isaac Kundaeli were charged with housebreaking contrary to s. 294 (1) of the Penal Code and stealing contrary to s. 265 of the Penal Code on separate counts. They were convicted of these charges and sentenced to two and a half years' imprisonment on the first count concurrently with six months' imprisonment on the second; corporal punishment also being awarded under the Minimum Sentences Act. They now appeal against conviction and sentence and their appeals have been consolidated.

The trial took a somewhat unusual course in that while the appellants pleaded not guilty to the first count, they pleaded guilty to the second. The appellant John appears to have admitted the whole theft whilst the appellant Isaac stated that it was true that he had stolen the mattresses but not the lion skin. The particulars of the second count were that on the 2nd April 1968 the appellants

having entered the guest house of Dr. Chopra had stolen two mattresses and a lion skin therein. The magistrate accepted the pleas on the second count and proceeded with the trial on the first count. He duly found on the evidence before him that the house had been broken into sometime during the day in question and that the two mattresses and lion skin had been stolen. There was no evidence that either of these appellants had been implicated. All that the prosecution had put forward was that Police Constable Francis had received information that a certain Paul Yona had received the articles from the appellant John. As a result John was arrested and later Isaac also. Paul Yona did not give evidence and therefore the information which the Constable repeated in court was inadmissible as being hearsay. The houses of the appellants were searched and nothing was found. Nevertheless, as the appellant, John, decided to give no evidence in his defence the magistrate concluded that as he had admitted stealing the articles from the house of Dr. Chopra, and as there was clear evidence that the house had been broken into, that therefore he was guilty not only of theft but also of breaking. On the other hand the appellant Isaac explained in his defence that he had not broken into the house but that he had stolen the mattresses when he had found them elsewhere. He then took them from their place of hiding and hid them in the coffee estate. After that he had left them. Nevertheless the magistrate still found this appellant guilty of housebreaking and theft.

In their petitions of appeal the appellants both argued that other people had been involved and that Paul Yona ought to have been called as a witness. The appellant Isaac further claimed that his co-accused had shielded his brother Ndekiro who ought also to have been called as a witness. The appellants appeared in court and the burden of their submission was that the trial court had not fully investigated the case.

Considering first the appeal of John, his plea to the second count was quite clear and he gave no defence. The only conclusion which the magistrate could draw was that he had stood by that plea and had not attempted to defend himself or to call evidence on the question of breaking. As in his case therefore the only issue was breaking, the trial had fully investigated the matter in dispute. I cannot see in his case that there can be any question but that he was properly convicted on each count.

But that result does not follow in the case of the appellant Isaac. First of all his plea only related to the mattresses and the magistrate should then have asked the prosecutor whether he was prepared to accept that plea and waive the question of the lion skin. It appears from the evidence that as it was alleged that a lion skin had also been stolen apart from the mattresses that the prosecution were not prepared to accept the plea tendered. Therefore a plea of not guilty should have been entered. At any rate when the defence was put forward it was a clear retraction of the plea as understood, that the appellant had stolen these two mattresses from inside the house which had been broken into. It was only a plea to theft by finding. Therefore without evidence to rebut the defence, such as that the accused had been found in possession of the stolen articles or had been dealing with them, the magistrate was in no position to infer from the defence admission of theft that the appellant must also have broken into the house. The magistrate should have accepted the defence as a retraction of the plea and if the prosecution was not prepared to accept it, a plea of not guilty should have been entered, and a retrial ordered. The appellant now argues that he did not make the admission even to the extent as recorded by the magistrate. That is clearly untrue. His words were "I stole the mattresses from P.W.1's house, I did not steal the mattresses in P.W.1's house, but I just stole it on the way being hidden. I then hid the mattresses in a coffee estate. After hiding the mattresses in a coffee farm I did not follow it. I do admit

that I did steal the mattress in question but I cannot tell to whom the mattresses I stole belong.” (sic). The statement makes it abundantly clear that the appellant admitted theft by finding. It follows that on the evidence the appellant Isaac could not be found guilty of housebreaking and theft therefrom.

A further difficulty arose out of the charge. This appellant and his co-appellant John were jointly charged with theft. No joint theft was proved. The appellant Isaac admitted a different theft to that charged. The rule in *R. v. Scaramanga*, [1963] 2 Q.B. 807 applies. Lord Parker there said after reviewing the authorities:

“In our judgment, except when provided by statute, when two persons are jointly charged with one offence, judgment cannot stand against both of them on a finding that an offence had been committed by each independently” (p. 814).

With respect that reasoning appeals to me as being both logical and sensible. I am not therefore in a position simply to substitute a conviction for theft by finding. But as the plea was not a proper plea in the first place, and was retracted later, I quash the convictions and set aside the sentences on the grounds that the trial of the appellant Isaac was a nullity. There will be a retrial.

In the result the appeals of the appellant Isaac are allowed to the extent indicated.

Returning now to the appeal of John against sentence, as the value of the property stolen was considerable, the sentences imposed were not manifestly severe and otherwise in accordance with the Minimum Sentences Act. They are confirmed as also the order for compensation. John’s appeals are therefore dismissed in their entirety.

First appellant’s appeal allowed.

Second appellant’s appeal dismissed.

Appellants unrepresented.

For the respondent:

S. K. Laxman (State Attorney, Tanzania)

Shah v Aguto
[1970] 1 EA 263 (CAM)

Division:	Court of Appeal at Mombasa
Date of judgment:	24 December 1969
Case Number:	20/1969 (21/70)
Before:	Sir Charles Newbold P, Duffus VP and Spry JA
Sourced by:	LawAfrica
Appeal from:	The High Court of Kenya – Trevelyan, J.

[1] *Appeal – Jurisdiction – Question of law – Second appeal – High Court reversing magistrate – Justification for reversal a question of law.*

[2] *Appeal – Fact, findings of – Trial court seeing witnesses and considering evidence – Whether appellate court should interfere.*

[3] *Civil Practice and Procedure – Judgment – Form of – Whether principles of law applied need be stated – Civil Procedure (Revised) Rules 1948, O. 20, r. 4 (K.).*

Editor's Summary

The appellant, a shopkeeper, had sued the respondent in the Resident Magistrate's Court for goods sold and delivered, gave evidence and produced his books of account and documents including a letter from the respondent's advocate. The respondent gave evidence denying the claim. The magistrate gave judgment for the plaintiff and on first appeal the High Court reversed this decision and gave judgment for the respondent. On appeal the appellant contended that the judge had been wrong to reverse the decision of the magistrate, and the question also arose whether this was an appeal on a question of law.

Held –

- (i) where a first appellate court has reversed a finding of fact it is a question of law whether it has acted judicially in doing so (*Fazelabbas Sulemanji v. Reg* (2) followed);
- (ii) the magistrate's judgment complied with O. 20, r. 4, Civil Procedure (Revised) Rules 1948, and it was not necessary for him to set out all the principles of law he was applying;
- (iii) the magistrate saw the witnesses, considered all the evidence and his conclusions were justified on the evidence before him. Accordingly, the judge was wrong to interfere with his judgment.

Appeal allowed. Judgment of magistrate restored.

Cases referred to in judgment:

- (1) *Abdul Hameed Saif v. Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270.
- (2) *Fazelabbas Sulemanji v. Reg* (1955), 22 E.A.C.A. 395.
- (3) *Peters v. Sunday Post*, [1958] E.A. 424.
- (4) *Merali v. Uganda*, [1963] E.A. 647.
- (5) *Selle v. Associated Motor Boat Co. Ltd.*, [1968] E.A. 123.

The following considered judgments were read:

Judgment

Duffus VP: This is a second appeal from the decision of a judge of the High Court reversing the judgment of the Senior Resident Magistrate Mombasa in a civil action.

This is a fairly simple case of a claim by a shopkeeper for groceries sold and

delivered to his customer. There were only two witnesses. The plaintiff on one side and the defendant on the other. The plaintiff is a shopkeeper trading in Mombasa and the defendant an employee of the E.A.R. & H. who apparently occupies a position of some responsibility in the railway. He is now the District Supplies Officer in Nairobi. In addition to his evidence the plaintiff tendered in evidence and relied on his books of account and also on certain documentary evidence and in particular a letter from the defendant's advocate admitting that the defendant had purchased goods from the plaintiff on credit but claiming that he settled his account in full before leaving Mombasa. The plaintiff also relied on certain figures on a bit of paper that he claimed were made by the defendant when he was leaving Mombasa and in arriving at the balance due. The defendant had been in Mombasa from August 1965 to April 1967. In his defence the defendant denied ever having received any goods from the plaintiff but in his evidence at the trial he admitted purchasing goods from the plaintiff but he states that he only did so on credit for the first two months of his stay in Mombasa and that thereafter he only purchased goods against payment.

The Senior Resident Magistrate after reserving his judgment for a week gave a considered judgment in which he accepted the plaintiff's case and gave him judgment for Shs. 3,965/- with costs. The defendant who had been then transferred to Nairobi appealed and succeeded in having his appeal transferred for hearing to Nairobi. On appeal the judge of the High Court reversed his decision and gave judgment for the defendant.

The plaintiff then appealed to this Court. This is a second appeal and in a civil case a second appeal only lies to this Court on questions of law as set out in s. 72 of the Civil Procedure Act. Mr. Khanna who appears for the respondent on this appeal raised the preliminary objection before us that an appeal did not lie under s. 72 in the circumstances of this case as the grounds of appeal were, he submitted, based only on facts. After hearing Mr. Gautama for the appellant, we overruled the preliminary objection for reasons which we said we would state in our judgments, and heard the appeal.

The provisions of s. 72 (1) are as follows:

“72(1) Save where otherwise expressly provided in the body of this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds namely:

- (a) the decision being contrary to law or to some usage having the force of law;
- (b) the decision having failed to determine some material issue of law or usage having force of law;
- (c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.”

The first ground of appeal states:

“The learned Judge erred in law in not directing himself sufficiently, properly or at all to the principles to be applied on an appeal against findings of fact of the Court of First instance.”

This ground of appeal is on a question of law. A Court of first appeal usually has a right to interfere with the findings of fact of the trial Court; but whether it is an appeal being heard by this Court from a trial in the High Court or by the High Court on an appeal from a Magistrate's court, this is a limited right

to be exercised judicially and it is not just the substitution of the opinion of the appeal court for the finding of fact made by the trial Magistrate or Judge who has had the opportunity of hearing and assessing the credibility of the witnesses. The powers of an appellate court are set out in s. 78 of the Civil Procedure Act and generally speaking it has the same powers as did the court of original jurisdiction. A High Court sitting in its appellate jurisdiction on a first appeal from the Magistrate's court is guided by the same principle as apply to this court when it is sitting on a first appeal from a High Court. There are numerous decisions of this Court setting out the principles to be followed by a Court on a first appeal and I would quote here from the judgment of Sir Kenneth O'Connor in the well-known case of *Peters v. Sunday Post*, [1958] E.A. 424 at 429 where he said:

"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the Judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."

I would also refer to the more recent case, of *Selle v. Associated Motor Boat Co. Ltd.*, [1968] E.A. 123 at 126 and to the following extract from the judgment of Sir Clement de Lestang, V.-P.: –

"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v. Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270)."

The cases which I have referred are appeals from the High Court to this Court but the same principles apply to appeals to the High Court from a Magistrate's court.

In this case the Judge of the High Court reversed the findings of fact of the trial Court and it is a question of law as to whether he has acted judicially in doing so. If the first appeal court has not acted in accordance with the principles which have been laid down then that court would have acted contrary to law and this Court has jurisdiction to hear the appeal in accordance with s. 72 (1) (a). This question was considered by this court in the appeals of *Fazelabbas Sulemanji v. Reg* (1955), 22 E.A.C.A. 395 and also in *Merali v. Uganda*, [1963] E.A.C.A. 647. In the *Sulemanji* appeal this Court said:

"A second appeal lies only on grounds of law, and it was submitted that the Crown's appeal was on issues of fact. We overruled this objection on two grounds, the first being the record indicated that the Crown would contend that the learned Chief Justice had in certain respects misdirected himself as regards the effect of the evidence. The other was the wider

ground that, where the High Court has reversed a judgment of a subordinate court, it must always, in our view, be a question of law whether there existed sufficient reasons for reversal. The situation is of course quite different where the High Court has dismissed the first appeal.”

There are some other nine grounds of appeal but all these grounds are directed to the same issue as to whether the judge was justified in law in reversing the findings of the trial magistrate. In the circumstances of this case the only way to determine this question is to consider the issues in the case, the evidence called, the trial magistrate’s decision and then the judge’s reasons for reversing this decision.

In this case, fortunately as I have said, the issue is a simple claim of a shopkeeper for the balance of goods sold and delivered to a customer. In a fairly short but in what I thought a quite adequate judgment the Resident Magistrate accepted the plaintiff’s claim. This was clearly a case in which one of the parties was deliberately lying and the trial court had to decide who was speaking the truth and in particular whether the plaintiff had established his claim. The Senior Resident Magistrate after having had the advantage of hearing both parties who gave evidence in the trial had no hesitation in finding that the plaintiff was speaking the truth and accordingly gave judgment for the plaintiff. In his judgment he stated that he did so because he believed and accepted the plaintiff’s evidence and he also went on to say that the defendant had been proved to be untruthful in two incidents:

- (a) where he said that he had bought goods to the value of Shs. 50/15 from the plaintiff and had paid him a cheque for Shs. 300/15 because the Magistrate found that this incident happened on a Sunday afternoon when in fact the shop was closed; and
- (b) when he said that he did not buy any goods on credit from the plaintiff during the period August 1965 to 16 April 1968 as this had been admitted in the letter from his advocate.

In his judgment the Judge of the High Court is most critical of the Resident Magistrate’s decision and he states *inter alia*:

“He must satisfy the Court that the books in which the entries were kept are genuine and that they were kept in the course of his business. The Court must consider and make findings not only upon the foregoing but also on the whole of the evidence, the inferences to be drawn from the same and the relative credibility of the parties. It must ponder on the balancing of probabilities and must remember at all times where the burden of proof lies. It is to be regretted that very little of this was done in this case. There was no finding that the books were kept in the course of business, no attention was paid to the genuineness of the books, e.g. invoices were said to have been made out yet they were not produced and entries are said to have been made from lists though invoices were made out, wrong inferences were drawn, incorrect conclusions on credibility were arrived at and the matter of the burden of proof was not perhaps considered.”

With respect, I think the Judge is not being altogether fair to the Senior Resident Magistrate. A Resident Magistrate is usually an extremely busy man and trials before him are of a summary nature, and the law does not require him to deliver that full and detailed judgment which the Judge appears to have considered necessary. Order 20, r. 4 sets out what a judgment should contain as follows:

- “4. Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.”

With great respect it does appear to me that the Resident Magistrate sufficiently complied with requirements of this rule. The law presumes that a judge or magistrate knows the law and is always mindful of the principles of the law applying to the particular case and in particular as to where the onus of proof lies. A judge or magistrate is under no duty to set out in detail all the various principles of law which he is applying except, of course, where there is any particular question of law to be decided or where there is a dispute between the parties as to what is the law in any particular matter. It is of course a different matter if it appears from his judgment that the judge or magistrate has misdirected himself on any particular question of law and it is, of course, also different when a judge or magistrate has to sum up or explain the law to assessors.

I would first consider the criticisms of the Judge on the question of the plaintiff's books of account which were produced in evidence. Section 37 of the Evidence Act refers to books of account and this states:

"37. Entries in books of account regularly kept in the course of business are admissible whenever they refer to a matter into which the court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability."

In this case the plaintiff produced his books of account containing the defendant's account. He states that he himself kept the defendant's account and that he kept such accounts for all of his customers. He states that when a sale was made by anyone else in his shop, he would enter this into the books from a list prepared by that other clerk. He also produced the ledger containing the defendant's account. These books were tendered and admitted without any objection being taken and clearly these must have been admitted by the Resident Magistrate as books of accounts regularly kept by the plaintiff in accordance with s. 37. There was never, at any time, any objections to these books being admitted in evidence as part of the plaintiff's case although the defendant was at all times represented by an advocate. It appears to me that in these circumstances, the Resident Magistrate was justified in admitting these books in evidence and in relying on the books to the extent that he did in his judgment, and that he did not misdirect himself on the law on this matter.

The Judge dealt at some length with the evidence of the defendant's handwriting. The plaintiff had alleged that the defendant had written some figures when he was calculating the balance due on the piece of paper and in Court the defendant was again made to write these figures. In his judgment the Resident Magistrate said this:

"I need not mention, for coming to a decision in this case, the question of the handwriting of the defendant exhibit 2. The stems of the 9s on exhibit 2 and 7 are certainly significant. In exhibit 7 the defendant appeared to me to be at pains to hide his usual handwriting. He took unduly long time to write the few figures that he was required to write in court."

On this question the Judge on appeal said:

"The magistrate sought to avoid the problem by the following comment:

'I need not mention, for coming to a decision, the question of the handwriting of the defendant on exhibit 2 and 7.'

That is a serious misdirection for a finding was required and should have been made upon it."

I agree with the judge that the Magistrate has not been clear in his findings but he must have meant that he was unable on the evidence before him to come to any conclusion on the identity of the handwriting. There was certainly not

sufficient evidence to find that the handwriting was the defendant's without taking into account the direct testimony of the plaintiff that he had seen the defendant write the disputed figures. In my view, the Magistrate would be justified in his comments on the defendant's action when asked to write in court, this would be all part of his impressions of the witness's demeanour when he was giving evidence. I agree that the observations of the Resident Magistrate here as to length of the tails of the 9s is quite inconclusive and should never have been made as it is normally wrong for a court to compare handwriting without the assistance of an expert witness but on the whole it appears that the Resident Magistrate did not take the handwriting into account as a factor to be considered in arriving at his final decision.

Two other matters on which the Judge disagreed with the findings of the Resident Magistrate were on the question as to whether the cheque had been made out for shillings three hundred or shillings three hundred and fifteen cents and also on the effect of the difference between the defendant's evidence and the letter written by the defendant's advocate. Both these matters were questions which the Resident Magistrate considered in arriving at the credibility of the witnesses.

On the question of the cheque there can be no doubt that the plaintiff was wrong when he said that the cheque was for three hundred shillings and not for three hundred shillings and fifteen cents. The Resident Magistrate found this to be so in his judgment but stated that he was satisfied that the plaintiff had made an honest mistake. The Judge finds that this was an impossible finding and states that clearly the plaintiff had been lying on this issue. With respect to the Judge I cannot agree with his finding as clearly this could have been an honest mistake and the trial Magistrate was in a far better position by having the parties before him to decide whether this was so. In fact, I note that on the very piece of paper which the defendant is alleged to have written the figures and which was produced by the plaintiff himself, the figure is shown as three hundred shillings and fifteen cents and this bears out the Resident Magistrate's finding that the plaintiff had made a genuine mistake in his evidence and had not been lying.

Then there was a question as to the difference between the defendant's evidence at the trial to the effect that he did not buy any goods on credit from the plaintiff during the period when it was stated in his advocate's letter that he did. The letter from the advocate confirms the plaintiff's case and the Resident Magistrate found that the defendant deliberately lied on this matter in his evidence to the Court. The Resident Magistrate's findings on this point would appear to be fully justified and I cannot with respect agree with the Judge that the Magistrate misinterpreted the position.

In his final conclusion the Judge finds that the Resident Magistrate should not have given a decision in favour of the plaintiff, that he had misdirected himself on the question of the books of account, that he was wrong to rely on the evidence of the plaintiff who had been proved to be patently untruthful on an important issue in the case, and further that he had not considered the balance of probabilities in their correct perspective. The Judge then found that, in his opinion, the burden of proof has not been discharged by the plaintiff and accordingly he reversed the judgment. With great respect to the Judge I do not think that he has correctly directed himself on this matter and has not given full consideration to the fact that the Resident Magistrate saw and heard the witnesses and was in a far better position than an appeal court, to decide on the witnesses' credibility especially when as in this case the issue depended on the integrity of the parties. In this case it appears to me that the Resident Magistrate fully considered the matter and considered all the probabilities of

the case and his conclusions were justified on the evidence before him and he has not, in my view, misdirected himself on any question of law.

I would allow this appeal, set aside the judgment and decree of the High Court and order that judgment be entered for the appellant in accordance with the judgment of the Senior Resident Magistrate. The appellant should have the costs of this appeal and of the appeal in the High Court, but with no certificate for two advocates.

Sir Charles Newbold P: I have had the advantage of reading in draft the judgment of Duffus, V.-P., and I agree with it. There will be an order in the terms proposed by him.

Spry JA: I also agree.

Appeal allowed.

For the appellant:

S. C. Gautama and C. Z. Shah (instructed by *Sharma and Shah*, Mombasa)

For the respondent:

D. N. Khanna (instructed by *Khanna and Co.*, Nairobi).

Uganda v Milenge and another [1970] 1 EA 269 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	29 December 1969
Case Number:	143/1969 (23/70)
Before:	Sir Charles Newbold P, Duffus VP and Spry JA
Sourced by:	LawAfrica
Appeal from:	The High Court of Uganda – Jones, Ag. C.J.

[1] *Criminal Practice and Procedure – Conspiracy – Separate trial – Jurisdiction to order – Grounds on which order may be made – Criminal Procedure Code, s. 134 (3) (U.).*

[2] *Criminal Practice and Procedure – Adjournment – Discretion of magistrate – Whether refusal to adjourn proper.*

[3] *Criminal Practice and Procedure – Trial – Refusal of State Attorney to present his evidence – Whether accused should be discharged or acquitted – Criminal Procedure Code, ss. 77, 83, 202, 209 (U.).*

[4] *Criminal Practice and Procedure – Costs – Costs against the State – No finding that prosecutor had no grounds for prosecution – Order improper – Criminal Procedure Code, s. 171 (1) (U.).*

Editor's Summary

Several accused were charged jointly on five counts with various criminal offences, the first count being of a conspiracy to defraud, which first count covered substantive offences in the four remaining counts.

The magistrate after hearing full argument ruled that the accused would be embarrassed if they had to defend all five counts, and under s. 134 (3) of the Criminal Procedure Code ordered that the prosecution had to elect either to proceed with the count of conspiracy alone and withdraw the other four counts or alternatively withdraw the count of conspiracy and proceed on the other four counts.

At the request of the State Attorney an adjournment was allowed and the following day the State Attorney on instructions of the Director of Public Prosecutions applied for a further adjournment in order to apply to the High

Court under s. 341 (1) (b) of the Criminal Procedure Code for the order to be set aside.

After hearing argument the magistrate ordered the trial to proceed. The State Attorney admitted that his witnesses were present but he refused to proceed.

The advocates for the accused then asked for and obtained an acquittal of the accused, and costs of Shs. 500/- in favour of each accused was ordered by the Chief Magistrate.

On appeal to the High Court the Chief Justice held that the magistrate was justified in acquitting the accused and dismissed the appeal.

On further appeal to the Court of Appeal, it was contended, inter alia, that the Chief Justice should have decided whether or not the ruling of the magistrate ordering a separate trial was correct; that the Chief Justice erred in holding that the magistrate had been right to acquit the accused; and that the award of costs by the magistrate in favour of the accused was incorrect.

Held –

- (i) the magistrate had a discretion to order a separate trial of the conspiracy charge and exercised his discretion correctly;
- (ii) the magistrate had a discretion to refuse a further adjournment of the case and exercised his discretion correctly;
- (iii) (by Duffus, V.-P., and Spry, J.A.; Sir Charles Newbold dissenting) the accused were entitled to be acquitted even though the prosecution had called no evidence (*R. v. Arvi Ratilal Ganji* (1) distinguished);

(By Sir Charles Newbold, P.), a person is neither tried nor placed in peril unless evidence is led on the charge, and in those circumstances the order of the magistrate should not have been an acquittal but a dismissal of the charge;

- (iv) no order for costs should have been made as there was no finding on whether the prosecution had reasonable grounds for prosecuting the accused.

Appeal allowed only on costs.

Case cited in judgment:

(1) *R. v. Arvi Ratilal Ganji* 6 U.L.R. 237.

Judgment

The judgment of Duffus, V.-P., and Spry, J.A., was read by **Duffus VP**: This is an appeal by the Director of Public Prosecutions from the judgment of the Acting Chief Justice sitting in his appellate jurisdiction on the decision of the Chief Magistrate at Gulu acquitting the two respondents and ordering costs to be paid by the prosecution. The Acting Chief Justice upheld the decision of the Chief Magistrate.

The facts as disclosed on the record of appeal show that the two respondents and a David Binagwaho were jointly charged on five counts with various criminal offences. The first count was for conspiracy to defraud and admittedly covered the offences charged in the four remaining counts. The accused David Binagwaho appears to have entered a plea of guilty and was convicted and sentenced on all five counts to

various terms of imprisonment. The trial then proceeded against the two respondents. The prosecution was represented by a State Attorney and the respondents were each separately represented by an advocate. The prosecution handed in an amended charge which was duly read

and explained to the respondents and each respondent pleaded not guilty. At this stage both the advocates for the respondents objected to the charge as it stood in that it contained a count for conspiracy along with other counts for the substantive offences forming the conspiracy. The application was that the count for conspiracy should be struck out. This matter was fully argued before the Chief Magistrate who ruled that the prosecution had to elect either to proceed with the count for conspiracy alone and withdraw the other counts, or alternatively withdraw the count for conspiracy and proceed on the other counts.

At this stage the State Attorney applied for and obtained an adjournment of the trial to the following day. On the resumption the following day, the State Attorney stated that he had been instructed by the Director of Public Prosecutions to apply for an adjournment in order to apply to the High Court under s. 341 (1) (b) of the Criminal Procedure Code to set aside the order made by the Chief Magistrate. After hearing arguments the Chief Magistrate refused the application and ordered the trial to proceed.

The State Attorney then stated:

“I am unable to proceed with this case in view of the ruling. I have witnesses but I am not calling them.”

The advocates for the accused persons then submitted that as no evidence was adduced although the witnesses and all the parties were present that the accused persons should be acquitted and they also applied for costs. The State Attorney replied opposing the application but he still maintained his position and failed to offer any evidence despite the ruling of the Chief Magistrate that the trial proceed.

The Chief Magistrate then ruled that in view of the State Attorney’s decision not to adduce any evidence that there was not sufficient evidence before him on which he could call upon the accused to make their defence, and he, therefore, acquitted the accused on the charges and he went on to award Shs. 500/- costs to each accused person.

The Director of Public Prosecutions appealed to the High Court. The main ground of appeal was that the Chief Magistrate erred in acquitting the accused persons before the prosecution had adduced any evidence at all and that the order of acquittal occasioned a miscarriage of justice. Other grounds were that the Chief Magistrate was wrong in his ruling that the accused persons would be prejudiced if the count for conspiracy was tried with the counts alleging the commission of the substantive offence and that he further erred in awarding costs against the prosecution.

On the appeal, the Chief Justice only dealt with the main ground of appeal and he held that the Chief Magistrate was justified in acquitting the respondents and he dismissed the appeal. He did not deal with the other two grounds.

In delivering his judgment the Chief Justice stated inter alia:

“I would have thought that it is axiomatic that where a prosecutor offers no evidence when a case is called on, the accused is *entitled* to an acquittal. In this case, witnesses were present, but Ayigihugu said that he was not calling them in view of the ruling delivered by the learned Acting Chief Magistrate refusing leave to appeal. In view of that I find it difficult to understand what else the Acting Chief Magistrate could have done, but acquit the accused.”

The appellant to this court complains that the High Court erred in holding that the Chief Magistrate was right to acquit the accused and further that the

Chief Justice was wrong in saying that an accused person is entitled to an acquittal when the prosecution offers no evidence and further that the High Court was wrong in not deciding:

- (i) whether the ruling of the Chief Magistrate for a separate trial of the count of conspiracy was correct; and
- (ii) whether the award for costs was correct.

We would first consider the Chief Magistrate's ruling as to the separate trial of the count for conspiracy. Section 134 (3) of the Criminal Procedure Code specifically provides for the order made by the Chief Magistrate. This subsection states:

"Where, before trial, or at any stage of a trial, the court is of opinion that a person accused may be embarrassed in his defence by reason of being charged with more than one offence in the same charge or indictment, or that for any other reason it is desirable to direct that the person should be tried separately for any one or more offences charged in a charge or indictment, the court may order a separate trial of any count or counts of such charge or indictment."

This subsection gives the trial court a wide discretion and is designed to prevent an accused person being embarrassed in his defence. There is ample authority to support the Chief Magistrate's view that in certain circumstances a count of conspiracy should not be joined with other counts charging the substantive offences which form the conspiracy, but the important factor here is that the Chief Magistrate is given a discretion to act in the manner that he did and that his decision on this matter is lawful and binding unless and until it is set aside by the High Court. The advocate appearing for the prosecution at this stage applied to the Chief Magistrate for an adjournment in order to apply to the High Court to reverse his order under the provisions of s. 341 (1) (b) of the Criminal Procedure Code. An application for an adjournment is here again a matter entirely within the discretion of the Magistrate or Judge presiding over the trial court and his decision whether or not to grant an adjournment cannot be questioned in his court and his directions as to the trial in his court must be obeyed. We are satisfied, therefore, that in the circumstances of this case that the decision of the Chief Magistrate that the prosecution should elect whether or not to proceed with the trial on the count of conspiracy or alternatively on the four remaining counts was a matter within his discretion and so was his refusal to grant an adjournment of the trial and his direction that the trial should proceed. His decision and his directions at this stage were without any doubt legal directions given by him in his judicial discretion and unquestionably his decision and directions had to be obeyed.

We would at this stage briefly consider the question of the authority and powers of the court and the position of a prosecutor and the accused person. All law in Uganda and the rights, privileges and obligations of its inhabitants and of its institutions, now all stem from the Constitution of the Republic of Uganda. Article 15 of the Constitution provides inter alia that

"15(1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

The courts in Uganda are all established by law. The Chief Magistrate's Court is established by the Magistrates' Courts Act (Cap. 36). The Chief Magistrate exercises the jurisdiction given to him by law, and the practice and procedure of his court is largely regulated in criminal matters by the Criminal Procedure Code. Provided that the Magistrate acts within his jurisdiction and

in accordance with his statutory powers his decisions and the rulings in his Court are binding on the parties whilst the trial continues. His decisions and judgments are of course subject to the review of the High Court and can be questioned by either party on appeal but until his decision or judgment is reversed or altered by the High Court then these are final and of binding authority. We appreciate the stand taken by the Senior State Attorney, Mr. Ssekandi, who appeared for the Director of Public Prosecutions before us, and as we would expect, he does not attempt to defend the action taken by the State Attorney who appeared for the prosecution at the trial, but rather Mr. Ssekandi attacks the orders made by the Chief Magistrate as being wrong in law and orders likely to lead to a miscarriage of justice. We will consider the law on this question in detail but before doing so, we must say that the attitude adopted by the State Attorney at the trial of this case was improper and most unfortunate and must have been extremely embarrassing to the acting Chief Magistrate who would appear, to judge from the record of appeal, to have acted throughout firmly but with dignity.

Section 3 of the Criminal Procedure Code provides:

- “3.(1) All offences under the Penal Code shall be inquired into, tried, and otherwise dealt with according to the provisions of this Code.
- (2) All offences under any other law shall be inquired into, tried, and otherwise dealt with according to the same provisions, subject, however, to any enactment for the time being in force regulating the manner or place of inquiring into, trying, or otherwise dealing with such offences:

Provided that notwithstanding anything in this Code contained, a court may, subject to the provisions of any law for the time being in force in Uganda, in exercising its criminal jurisdiction in respect of any matter or thing to which the procedure prescribed by this Code is inapplicable, exercise such jurisdiction according to the course of procedure and practice observed by and before Her Majesty’s High Court of Justice in England.”

It is to be noted that it is only when the procedure described by the Code is inapplicable that the court may act in accordance with the procedure and practice of the High Court of Justice in England. It is necessary, therefore, to first examine the Criminal Procedure Code to see if any of its provisions applied to this rather unusual case.

In the circumstances of this case the Chief Magistrate was placed in a position where he had to either adjourn the case or to make an order that would dispose of the case. As we have stated the Chief Magistrate acted within his discretion and in our view quite properly when he refused to further adjourn the case and ordered the trial to continue and it was at this stage that the prosecutor announced that his witnesses were there but that he did not propose to call these witnesses and that he was unable to proceed further with the case in view of the ruling. The Chief Magistrate after hearing legal submissions by the advocates then considered that this was a case which came within the ambit of s. 209 of the Criminal Procedure Code and he acquitted the respondents. Section 209 states:

“If at the close of the evidence in support of the charge it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him.”

It is essential to consider the powers of a public prosecutor such as the State Attorney in this case. The first elementary principle is that he is the person who decides what witnesses to call and that he, at any rate, at the trial, has

complete control of the prosecution in court. He can at any stage of the prosecution close his case and call no further evidence, and it is from this power that the practice has arisen for a prosecutor who does not desire to proceed with the prosecution against an accused person to offer during the course of the trial “no evidence” or “no further evidence”. This results in the evidence for the prosecution “being closed” and the court then acts under s. 209, and if a case has not been made out sufficiently to call an accused person to make his defence then the court dismisses the case and acquits the accused. Both the advocates appearing for the Director of Public Prosecutions and for the respondents agree from the bar that this is the usual practice in Uganda when the prosecutor desires to end the prosecution and have an accused person acquitted, although Mr. Ssekandi suggests that this is only done after the prosecution has called at least one witness. It is, however, for the prosecution to call what witnesses they desire and it does appear to us, that if a prosecutor announces that he is calling no evidence, that the court must regard this as the “close of the evidence in support of the charge” and act in accordance with s. 209.

There are other sections under which the prosecution can act if it desires an accused to be discharged but not acquitted. The power to enter a *nolle prosequi* under s. 77 would not apply to this case but the provision of s. 83 would apply and there a public prosecutor may with the consent of the court or on the instructions of the Director of Public Prosecutions withdraw the charge and then if the accused person has not been called upon to make his defence he is discharged but not acquitted. The court, however, could only act under s. 83 on the application of the public prosecutor and no such application was made in this case.

Then there are the provisions of s. 202 which provide that if the prosecutor, having had notice of the time and place appointed for the hearing of the charge does not appear, that the Court dismisses the charge and such dismissal shall not operate as a bar to subsequent proceedings. Mr. Ssekandi submitted that the court may have acted under the provisions of this section in the circumstances of this case and he referred to the judgment of the High Court of Uganda sitting on appeal in the case of *Arvi Ratilal Ganji*, 6 U.L.R. 237. In that case the accused was charged with reckless driving. The case was fixed for hearing and on the hearing day an Inspector of Police appeared for the prosecution. The main prosecution witness, although warned to attend, failed to appear in time at the trial and the Magistrate after calling upon the prosecution to prove their case which they could not do, proceeded to acquit the accused. The two judges on appeal held that the magistrate’s proper course was either to have adjourned the case or to have dismissed the charge under the provisions of s. 197 of the then Criminal Procedure Code. Section 197 is similar to s. 202 in the present Criminal Procedure Code. In their judgment the court state:

“We think that the proper course for a Magistrate where the Crown case cannot be heard by reason of a total absence of witnesses is either to adjourn the hearing, or if that is for some reason impossible to dismiss the charge unheard. We are aware that the Criminal Procedure Code does not precisely cover the present facts. But we think the position is analogous to that envisaged by s. 197 of the Criminal Procedure Code, that is the position which arises when the ‘complainant’ is absent. That section by the word ‘complainant’ probably means a private person who has made a complaint to the Court. In the absence of this person clearly there can be no ‘trial’ and no true joinder of issue. The Court under these circumstances either adjourns or dismisses the charges.

“It seems to us that the position is substantially the same where the Magistrate has before him merely a public prosecutor, whose function is

simply to conduct the case and to examine the persons who are the true informants. If the latter are absent, and yet it is known that they are in existence and that their attendance can be secured, it seems to us little short of farcical to embark on a trial of the case and to acquit the accused, the complaint against him being wholly unheard.”

The position, of course, was quite different in this case. Here the Public Prosecutor, a State Attorney, stated that all the witnesses were present and he was not proceeding with the case and he was not calling the witnesses. Section 202 is designed to cover the case where a complainant does not appear but here the prosecutor and all his witnesses were present and clearly, in our view, s. 202 could not possibly apply.

The question is does s. 209 apply? Here the Public Prosecutor has announced that his witnesses are present but he does not intend to call any witnesses or to proceed with the case. The Magistrate regarded this as amounting to “the close of the evidence in support of the charge”. There was in fact no evidence called, but what action can a court take if the prosecutor announces that he is calling no evidence and is not proceeding with the case? The court cannot itself call the witnesses, and as we have stated, it is the duty of the prosecutor to call such witnesses as he thinks fit in order to establish his case. Here he has decided to call no witnesses and we are of the view that the Chief Magistrate was in all the circumstances here justified in his view that he had closed his case. The advocates for the appellants then applied for an acquittal and various submissions from both sides followed but the State Attorney still maintained his position and in our view the Chief Magistrate then correctly applied the provisions of s. 209. If no evidence is offered by the prosecution, this must be regarded as the close of the evidence in support of the charge even if in fact no evidence was called. We are, therefore, satisfied that the Chief Magistrate acted correctly in acquitting the accused persons under the provisions of s. 209.

Section 171 of the Criminal Procedure Code gives the court jurisdiction to award costs. The application in this case was apparently made either under s. 171 (b) or s. 171 (e). The Chief Magistrate does not state under what section he acted but as the provisions of subsection (e) only apply to matters of an interlocutory nature, including adjournments, it is clear that he must have acted under the provisions of subsection (b) which states:

“171 (1) A court may order the payment of costs in any of the following circumstances:

(a) . . .

(b) to any person acquitted of any offence by such court, by the prosecutor, whether public or private, if the court considers that the prosecutor had no reasonable grounds for prosecuting such person.”

The jurisdiction of the court to grant costs under the subsection only applies “if the court considers that the prosecutor had no reasonable grounds for prosecuting such person”. In awarding the costs the Chief Magistrate said:

“It is patently clear why the State has chosen this course. The accused have been put to unnecessary expense by this. I therefore order that the prosecution pays to the accused Shs. 500/- each in way of costs.”

The Chief Magistrate has not stated what was “patently clear” but he must be referring to the fact that the State Attorney had apparently acted in pique because of his ruling as to separate trials and because he refused an adjournment. The Chief Magistrate does not appear to have considered whether the prosecution had any reasonable grounds for the prosecution. If he had intended

to award costs under s. 171 (b) he should have enquired whether there were reasonable grounds for prosecution and then have made a finding of fact on this question, as it is, he appears to have awarded costs here because of the unreasonable attitude of the State Attorney, and this he had no power to do. We would, therefore allow the appeal on the question of costs.

The appeal against the acquittal of the respondents by the Chief Magistrate is dismissed and his order in this respect confirmed. The appeal against the award of costs is allowed and the Chief Magistrate's order that the prosecution pays costs to the respondents is quashed.

Sir Charles Newbold P: I regret that I am unable to sign the judgment of the Court as I am of a different opinion on each of the two issues. As regards the issue whether the order of the Chief Magistrate should have been an acquittal, as the matter is of some importance I shall very briefly set out my reasons for my view.

A plea of autrefois acquit cannot be successfully raised unless the person raising it has been placed in peril of conviction at his trial on a charge. A person is neither tried nor placed in peril unless evidence is led on the charge on which he is before the Court. No evidence was led against the two respondents nor were they tried on any charge. It followed that the order of the Magistrate should not have been an acquittal on the charge but a dismissal of the charge.

Appeal allowed only on costs.

For the appellant:

F. Ssekandi (State Attorney)

For the first respondent:

E. S. Kirenga (instructed by *Kazzora and Co.*, Kampala)

For the second respondent:

M. C. Patel

Yusuf v Republic
[1970] 1 EA 276 (HCT)

Division:	High Court of Tanzania at Dar es Salaam
Date of judgment:	15 October 1969
Case Number:	444/1969 (30/70)
Before:	Georges CJ
Sourced by:	LawAfrica

[1] *Criminal Law – Theft – By servant – Use of money received by virtue of employment – Belief that owner would not object – Whether fraudulent taking – Penal Code, s. 258 (T.).*

Editor's Summary

The appellant was employed by TANU as a Regional Executive Secretary. In August 1968 he received some money to pay for repairs to a land rover. He used part of this money to pay his fare home and while at home he spent the rest. The following month when he reported to TANU headquarters he informed the head of the accounts division that he had used the money. He was told that the amount would be deducted from his salary. The whole amount was deducted from his December salary. In February 1969 the appellant was charged with stealing by servant and was convicted.

Held – There could be no fraudulent taking and therefore no theft if there could exist a genuine belief, reasonably held in the circumstances that the use of the money in the circumstances would not be objected to by the owner. (*R. v. Cockburn* (2) considered.)

Appeal allowed. Conviction quashed and sentence set aside.

Cases referred to in judgment:

- (1) *R. v. Williams*, [1953] 2 W.L.R. 937.
- (2) *R. v. Cockburn*, [1968] 1 All E.R. 466.

Judgment

Georges CJ: The appellant in this case was charged with stealing by a servant c/ss 271 and 265 of the Penal Code. It was alleged that on or about 7 August 1968, being a person employed by the Tanganyika African National Union as a Regional Executive Secretary he stole Shs. 695/- which came into his possession by virtue of his employment and which was the property of his employers.

The appellant admitted taking the money which had been given to him to pay for repairs to a land rover. He had gone to Peramiho with the land rover and the money but the father in charge of the repair shop had refused to take the money before some estimate had been prepared of the probable cost of the repairs. His evidence was that he had then returned to Songea where he had received a message from TANU headquarters authorising him to travel to Morogoro as some member of his family was sick. There was at the time no superior officer of TANU at Songea. He decided therefore to use part of the Shs. 695/- which he had in his possession to pay his fare home and while at home he used more of the money.

On 13 September 1968 he reported to TANU headquarters and informed the head of the accounts division that he used the money. This person told him that deductions would be made from his salary. He asked that no deductions be made during his period of leave – September, October and November – but that the whole amount be deducted in December 1968. This was in fact done.

The charge sheet was signed by the Public Prosecutor on 14 February 1969. It appears from the evidence of Anyangisye that he received the report of the alleged theft from TANU Office in Dar es Salaam on 23 November 1968 by a letter date 19 November 1968.

The facts stated by the appellant in his defence were in no way contradicted by the prosecution's case. The name of the head of the accounts division who agreed to the deduction of the money was not given, nor was he called as a witness. The record does not make it clear when the appellant was arrested or where he was arrested, but it would appear that at the time of his arrest he was still Regional Secretary for TANU in Ruvuma Region.

The District Magistrate held that the fact that the money had been refunded was immaterial. He stated:

“By that section (s. 258 (2) (e) of the Penal Code) the offence is committed when a person converts the money into another's use other than that which he was instructed. Indeed one shall refund the money probably within a very short time, say even within five minutes. But when you refund you make the refund with some other money and not that which was misappropriated. It shall be another money although the amount and value is quite the same. Still, one shall have already committed the offence by that section and that one should refund merely confirms the commitment of the offence. There is no mens rea required by s. 258 (2) (e) of Cap. 16.”

Although the District Magistrate was clearly sympathetic in this case, once he had convicted he was compelled to impose the minimum sentence required

by law of two years' imprisonment and 24 strokes corporal punishment. He advised that a petition be addressed to his Excellency the President to show his powers to reduce or waive the penalty in this case.

The view taken by the magistrate in this case does have support by an English authority. In *R. v. Cockburn*, [1968] 1 All E.R. 466, Winn, L.J., stated the view of the Court as follows:

“The fact of the matter, however, is this: that whereas larceny may vary very greatly to the extent, one might say, of the whole heavens between grave theft and a taking which, whilst technically larcenous, reveals no moral obloquy and does no harm at all, it is nevertheless quite essential always to remember what are the elements of larceny, that is to say, taking the property of another person against the will of that other person without any claim of right so to do, and with the intent at the time of taking it permanently to deprive the owner of it. If coins, half a crown, a 10s. note, a £5 note, whatever it may be, are taken in all the circumstances which I have already indicated with the intention of spending or putting away somewhere those particular notes or coins, albeit not only hoping but intending and expecting reasonably to be able to replace them with their equivalent, nevertheless larceny has been committed because with full appreciation of what is being done, the larcenous person, the person who commits the offence, has taken something which he was not entitled to take, had no claim of right to take, without the consent of the owner and is in effect trying to force on the owner a substitution to which the owner has not consented.”

The court in that case expressly disapproved a passage attributed to Lord Goddard, C.J., in *R. v. Williams*, [1953] 2 W.L.R. 937 at p. 942. This passage did not appear in citations of the case in [1953] 1 All E.R. 1068, [1953] 1 Q.B. 660 and 37 Cr. App. Rep. 71. The passage reads:

“It is one thing if a person with good credit and plenty of money uses somebody else's money which may be in his possession and which may have been entrusted to him or which he may have had the opportunity of taking, merely intending to use those coins instead of some of his own which he has only to go to his room or to his bank to obtain. No jury would then say that there was any intent to defraud or any fraudulent taking, it is quite another matter if the person who takes the money is not in a position to replace it at the time but only has a hope or expectation that he will be able to do so in the future. . . .”

Commenting on that passage, Winn, L.J., said:

“I venture to think that quite probably, Lord Goddard, C.J., felt about that passage what I myself not only feel but now say that it is an extremely dangerous and misleading statement.”

Lord Goddard, C.J., was himself a member of the court which decided *R. v. Cockburn*.

In my view it must be borne in mind that theft must inevitably carry with it connotation of fraud. Section 258 of the Penal Code defines theft thus:

“A person who *fraudulently* and without claim of right takes anything capable of being stolen, or *fraudulently* converts to the use of any person other than the general or special owner thereof anything capable of being stolen, is said to steal that thing.”

Subsection (2) deals with the definition of fraud and states that a person who takes or converts anything capable of being stolen is deemed to do so

fraudulently if he does so with any one of a number of intents, among being an intent to deprive the owner permanently of the thing or in the case of money to use it at one's will even though there may be an intention afterwards to repay.

It is significant that in the definition of theft in *R. v. Cockburn* quoted above, no mention is made of the word "fraudulent". It seems to me incredible and against all reason that a person who in the course of a journey is entrusted with a twenty shilling note to deliver to someone at the other end should be held guilty of larceny if in the course of that journey he spent that note for his own purposes even though on his arrival he handed over a similar twenty shilling note to the person whom it had been sent. To describe such conduct as being technical larceny appears to me to go much further than is required in order to make sure that the limits of dishonest conduct are not too widely set. Unless it was known, for example, that the particular twenty shilling note which had been entrusted for delivery had some intrinsic worth over and above its face value, it would appear to me that the person to whom it was entrusted could reasonably assume that the owner would have no objection to its use and immediate replacement so long as the person to whom it had in fact been sent received twenty shillings. It appears to me that there could be no theft not because there was an intention to repay but because there could exist a genuine belief, reasonably held in the circumstances, that the use of the particular twenty shilling note under these circumstances would not be objected to. As I have indicated the position would be otherwise if there were specific instructions to deliver a particular note or a particular coin and if such instructions were wilfully ignored.

In this case, on the facts put forward by the defence it seems clear that the appellant felt that he would have obtained permission to use the money in the circumstances which had arisen. He reported to the Headquarters of TANU that he had done so. No steps were taken against him. He was allowed to remain in the employment of TANU and he was allowed to go on leave. Arrangements were made to have the money deducted from his pay at his convenience and the money was in fact deducted.

I find it impossible in these circumstances to hold that there was a fraudulent taking.

Mr. Chandu argued with much force that if this was permitted then the employee using his employer's money could put up as a defence a reasonable belief that he could have had the money as a loan if there had been a prior opportunity to make the request. This possibility does not appear to me to be alarming. If there are specific instructions that the money must not be used other than for purposes for which they have been given, then obviously an employee will not be able successfully to advance in his defence a belief that he would subsequently have obtained authority. In this case the reasonableness of the appellant's belief was justified by the action taken afterwards in treating the amount as a debt and having it deducted from his salary.

I would hold, therefore, that the charge has not been established. The appeal is allowed. The conviction is set aside and the sentence is quashed. The appellant is to be released unless otherwise lawfully detained.

Appeal allowed.

The appellant did not appear and was not represented.

For the respondent:

M. Chandoo (State Attorney, Tanzania)

Chamba v Republic
[1970] 1 EA 280 (HCT)

Division: High Court of Tanzania at Dar Es Salaam
Date of judgment: 24 October 1969
Case Number: 703/1969 (31/70)
Before: Mustafa J
Sourced by: LawAfrica

[1] Criminal Law – Obtaining by false pretences – Accused attempted to obtain money from corporation for a cheque drawn in favour of corporation – Cheque obtained through false representation from third party – Accused issued with receipt – Whether false pretences – Whether obtaining goods by false pretences – Penal Code, ss. 302 and 381 (T.).

[2] Criminal Practice and Procedure – Charge – Obtaining by false pretences – Whether charge must state to whom goods belong – Penal Code, s. 302 (T.).

[3] Evidence – Admissibility – Obtaining by false pretences – Whether evidence of other related false representations admissible – Evidence Act 1967, ss. 8 and 56 (T.).

Editor's Summary

The appellant through false representations obtained from one Ahmed a cheque for Shs. 2,000/- drawn in favour of his employer the National Housing Corporation. He falsely represented to the accounts officials that the cheque was for him. A receipt of Shs. 2,000/- was issued to him. He then asked the accountant to set off his debt of Shs. 1,500/- to the Corporation and give him the balance of Shs. 500/- in cash. Before the appellant was paid Ahmed made inquiries about his cheque. The appellant was arrested and was later convicted on two counts: of attempting to obtain money from the Corporation by false pretences, and of obtaining goods – a receipt for the cheque – by false pretences.

On appeal it was contended that the charge was bad as not alleging that the money or goods was the property of any person, that evidence of false pretences made to Ahmed was inadmissible and that the evidence showed only an attempt to obtain money from Ahmed and not from the Housing Corporation.

Held –

- (i) on a charge of obtaining by false pretences it is not fatal to the charge to omit to state the ownership of the property;
- (ii) the evidence of the false representations to Ahmed were part of the same transaction and so interconnected as to be admissible;
- (iii) the evidence showed that the appellant had made false representations to the Corporation.

Appeal dismissed.

Cases referred to in judgment:

- (1) *R. v. Martin* (1838), 112 E.R. 921.
- (2) *R. v. William Marsh and James Bell Lord* (1849), 169 E.R. 348.

Judgment

Mustafa J: The appellant was convicted on one count of attempting to obtain money by false pretences and one count of obtaining goods by false pretences, and sentenced to nine months and two months imprisonment respectively, to run concurrently. He now appeals.

The appellant was an assistant secretary of the National Housing Corporation. Ahmed Ali Shirwa had applied to the Corporation for the allocation of a house on a tenant/purchase basis at the instigation of appellant. The appellant falsely represented to Ahmed that his application had been approved, and obtained from Ahmed a cheque for Shs. 2,000/- drawn in favour of the National Housing Corporation as a deposit. It appears it is not unusual for an intending tenant to put down a deposit at the time he makes an application for a house. After he had received the cheque for Shs. 2,000/-, the appellant took it to the National Housing Corporation and attempted to cash it. He made false representations to the accountants and other officials of the National Housing Corporation that the cheque was for him. At that time the appellant owed the National Housing Corporation a sum of Shs. 1,500/- and he asked the accountant to set off his debt of Shs. 1,500/- to the Housing Corporation and to give him the balance of Shs. 500/- in cash. It seems the Housing Corporation was in the process of clearing the cheque, but before the appellant was paid the Shs. 500/- in cash Ahmed made inquiries about a receipt for his cheque. It then transpired that the cheque made out by Ahmed was in favour of the National Housing Corporation, and the appellant was arrested. When the appellant handed the cheque to the cashier of the Housing Corporation he was in the usual course of business issued with a receipt for the said cheque for Shs. 2,000/-, and it is in respect of this receipt that the second charge was preferred against him. The facts herein stated are not in dispute.

The appellant was charged as follows:

"1st Count:

Offence, Section and Law: Attempting to obtain money by false pretences c/s 381 of the Penal Code.

Particular of the Offence: The person charged on 25 July 1968 at about 11.00 hours at the National Housing Corporation Headquarters, Mtoni, within the City of Dar es Salaam, Coast Region, with intent to defraud, did attempt to obtain Shs. 2,000/- from the said Corporation by falsely pretending that cheque No. 422027 issued in the name of the said N.H. Corporation by one Ahmed Ali Shirwa was for him (Accused) whereas in fact the cheque was for the Corporation.

2nd Count:

Obtaining goods by false pretences c/s 302 of the Penal Code.

Particulars of the Offence: The person charged on 26 July 1968 at the National Housing Corporation Headquarters, Mtoni, within the City of Dar es Salaam, Coast Region, with intent to defraud, did induce the said Corporation to deliver to him receipt No. 6812 in his name valued at cts. 20, by falsely pretending that cheque No. 422027 issued in the name of the said N.H. Corporation by one Ahmed Ali Shirwa was for him (Accused) whereas in fact the cheque was for the Corporation."

There are three grounds of appeal. Counsel for appellant states the conviction is bad in law, since the charge did not lay the money or the goods as the property of anyone. Secondly, the trial magistrate had admitted evidence which has the effect of establishing that the appellant was the type of person who would make false representations and is of bad character. Thirdly, there was a variance between the charge and the evidence led.

As regards the first ground of appeal counsel states that it has not been alleged as regards the first count whose property the sum of Shs. 2,000/- was. He relies on two old English cases, *R. v. Martin*, 112 E.R. 921 at p. 923, and *R. v. William Marsh and James Bell Lord*, 169 E.R. 348. In the *R. v. Martin*, decided in 1838, it was held that:

“An indictment, under stat. 7 & 8 G. 4, c. 29, s. 53 for obtaining goods by false pretences, must state to whom the goods belonged. Otherwise it will be bad on error; the omission not being cured after verdict by the last clause of stat. 7 G. 4, c. 64, s. 21, that provision relating to the description of the offence, not of the subject-matter.”

Here counsel states, in the charge against the appellant it has not been averred who was the owner of the Shs. 2,000/-. I think he means that although there is an averment that the cheque was for the Corporation that does not specifically state that the Corporation was the owner of the cheque and therefore the charge does not lay the money as the property of anyone. In my view, a charge has to specify with sufficient certainty what a person is charged with. Here the appellant was charged with falsely pretending that the cheque in question which was issued in the name of the National Housing Corporation was for him although in fact the said cheque was for the Housing Corporation. I think it is clear enough to appellant what he was being charged with. I am not persuaded that in a charge of false pretences it must be stated to whom the goods belong. The authority quoted by counsel refers to obtaining goods by false pretences under an old statute, 7 & 8 Geo. IV. I very much doubt if it is still good law; in any event I am not prepared to follow it. Section 302 of our Penal Code reads:

“302. Any person who by any false pretence, and with intent to defraud, obtain from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanour, and is liable to imprisonment for three years.”

This is more in line with the Larceny Act 1916, of England. I have not been able to obtain a copy of the statute of 7 & 8 Geo. IV, clause 29, s. 53, but in Archbold, Criminal Pleading Evidence and Practice (35th Edn.), in dealing with the offence of false pretences under the Larceny Act 1916, it is stated in para. 1936: “Ownership of the goods need not be alleged, nor intent to defraud any particular person: Indictments Act 1915, Sch. 1. . . .” I do not think therefore this particular ground of complaint is valid these days, and as I read s. 302 of the Penal Code I am of the opinion that it is not fatal to omit mentioning to whom the money belongs.

As regards the second ground of appeal, that a considerable amount of inadmissible evidence was admitted, which must have prejudiced the appellant, counsel draws my attention to evidence adduced which relates to false pretences or false representations made by appellant to Ahmed. It is alleged evidence was given to show that appellant had falsely represented to Ahmed that his application for a house had been approved, that he falsely represented to Ahmed that the agreement in respect of his house was being typed but was not completed and that the documents would be ready shortly, and that he had been allocated a house whereas in fact it was not true. There was also evidence adduced to show that Ahmed had not been allocated any house by the National Housing Corporation, and also evidence adduced that the Housing Corporation did not at any time ask Ahmed to deposit the sum of Shs. 2,000/-. Counsel states all these pieces of evidence had the effect of showing that the appellant was a person who would go about making false representations. He says that the appellant was not charged with making false representations to Ahmed and all this evidence was irrelevant and inadmissible, and would be evidence of bad character and could have prejudiced the appellant. He says the admission of this evidence could have seriously affected the trial magistrate, and it cannot now be said that the trial magistrate would still have convicted the appellant in spite of this inadmissible evidence.

I am not persuaded this is so. In my view the evidence which has been adduced forms part of a pattern and the evidence is a part of the same transaction resulting in the presentation of the cheque by the appellant to the Housing Corporation. It is true the appellant has made false representation to Ahmed as well as to the Housing Corporation, but in my view the false representations to both the parties are so interconnected that the false representations made by the appellant to Ahmed would be relevant and admissible; see s. 8 of the Evidence Act. I do not agree that the evidence objected to by the appellant's counsel was inadmissible under s. 56 (1) of the Evidence Act in the circumstances.

The third ground of appeal was that there was a variance between the charge and the evidence adduced. Counsel states the evidence adduced only shows that the appellant had made false representations to Ahmed and attempted to obtain the money from him; not the Housing Corporation. I disagree. It is true the evidence led does show that the appellant has made false representations to Ahmed, but it also shows that he has made false representations to the Housing Corporation. Sydney Darling Chikoti, assistant accountant in the National Housing Corporation, states inter alia:

"He (appellant) called me to his office and there he produced a cheque of Shs. 2,000/- and requested me to take the cheque to Accounts Section and also informed that out of Shs. 2,000/-, Shs. 1,500/- should be taken against the accused's debts and Shs. 500/- in cash to be paid to him. The debts were attachment of his salary at N.H.C. I do not remember the cheque number but if I saw it now I would recognise it. The payee was the N.H.C. I asked the accused to put it in writing. He then wrote in form of minute on a piece of paper to take Shs. 1,500/- against the debts and Shs. 500/- to be paid in cash. I also asked him why the cheque was made in the name of N.H.C., and he said that a friend of his had given it to him. He did put the instructions in writing. He did it in my presence."

And again Rao, the chief internal auditor, states inter alia:

"The accused had prior to this telephoned me and requested me to encash a personal cheque. I had directed him to see the proper person"

and again:

"The accused then said that the drawer was away on safari and he required it urgently. I then requested the accused to give me a letter stating clearly therein that this cheque had been *given* to him by a friend"

and Francis Walter Figuereido states inter alia:

"On 26 July 1968 the accused approached me regarding a cheque of Shs. 2,000/-. He wanted Shs. 1,500/- being taken against the attachment and Shs. 500/- in cash. I inquired why was the cheque payable to N.H.C. and he said that it was so because a friend of his had purchased a house from him and it was a part payment, and the friend had gone away on safari."

There is evidence that the cheque by Ahmed was for the National Housing Corporation as a deposit for the supposed allocation of a house, and was at no time a cheque for the appellant. So, although there was evidence which referred to false representations made by the appellant to Ahmed there is, as I have tried to indicate, plenty of evidence which refers to the charge. There is no variance as such, although there is plenty of evidence which concerns false representation made by appellant to another person. I have already held that that evidence is closely related to the evidence of false representations made by the appellant to the National Housing Corporation.

In my view the trial magistrate was right to convict the appellant on the first count of attempting to obtain money by false pretences from the National Housing Corporation. The trial magistrate rightly held that there was much more than mere preparation; there was sufficient evidence of attempt.

As regards the second count, that of inducing the Corporation to deliver to the appellant a receipt in his name valued at 20 cents, there is evidence that appellant had never asked for the receipt to be issued. He merely handed over the cheque to the cashier, Mwasabwite, who was instructed by Francis Figueredo to issue a receipt to the appellant. There is evidence to show that whenever any money or cheque is handed over to the National Housing Corporation a receipt is issued. Francis Figueredo has said he sent the receipt with a messenger to the appellant, and the appellant has not challenged that piece of evidence. The trial magistrate in his judgment said: "I find it as a fact that the accused, knowing the Corporation's regulation, expected to receive the receipt on the presentation of the cheque." The appellant was a senior official of the Corporation, and although he did not demand a receipt he knew he would be issued with one. The trial magistrate said: "He therefore must have known that he would be issued with the receipt by presenting the cheque. This was therefore representations made by the accused by his conduct. . . ." I tend to agree.

In my view the sentences imposed are by no means excessive.

Appeal dismissed.

For the appellant:

A. A. Lakha (instructed by *Fraser Murray, Roden & Co.*, Dar es Salaam)

For the respondent:

Miss A. G. Madete (State Attorney, Tanzania)

Simon and another v Carlo and others
[1970] 1 EA 284 (HCT)

Division:	High Court of Tanzania at Arusha
Date of judgment:	11 August 1969
Case Number:	32/1968 (32/70)
Before:	Platt J
Sourced by:	LawAfrica

[1] *Damages – Fatal accident – Value of dependencies – Assessment of total dependency as lump sum – What factors court should consider.*

[2] *Negligence – Collision – Straight road – No evidence except drivers' conflicting testimony – Whether liability to be divided equally between drivers.*

Editor's Summary

The plaintiffs were dependants of a passenger in the third defendant's car who was killed when the car collided with the first defendant's car. At the trial each driver blamed the other for causing the accident. No other witnesses were available.

Held –

- (i) both the first and the third defendants must have been at fault and the liability should be divided between them equally. (*Bray v. Palmer* (1) and *Baker v. Market Harborough Co-op. Society* (2) followed);
- (ii) in computing the value of the dependencies the age and health of the deceased, the age of the wife and other dependants are factors to be considered. (*Coles v. Hollis Bros. & Co.* (3) considered.)

Judgment for the plaintiffs.

Cases referred to in judgment:

- (1) *Bray v. Palmer*, [1953] 2 All E.R. 1449.
- (2) *Baker v. Market Harborough Co-op. Society*, [1953] 1 W.L.R. 1472.
- (3) *Coles v. Hollis Bros. & Co.*, [1962] 1 Lloyd's Rep. 50.
- (4) *Williams v. Richard Thomas & Baldwin Ltd. & Bros.* Kemp & Kemp, *The Quantum of Damages* (2nd Edn.), Vol. 2, p. 69.
- (5) *Fels v. Pyer*. Kemp & Kemp, *The Quantum of Damages* (2nd Edn.), Vol. 2, p. 50.
- (6) *Martin Edmond Gaspar v. Meru Co-op. Union Ltd.* (Unreported.) E.A.C.A.

Judgment

Platt J: The plaintiffs in this suit are the duly appointed administratrix of the estate of Alexander Job; Hulda Simon being his mother and Anna Shadrack his wife. Their appointment was admitted at the commencement of the trial, and they claim on behalf of the mother and father of the deceased, the widow Anna, two daughters Martha and Juliana, said to be aged eight and seven years respectively at the time of Alexander's death. It transpires from the evidence that his mother and father were aged approximately 50 and 60 years respectively, his wife about 25 years of age and the children about a year or so younger all round than the ages given in the plaint. It is of course difficult to get the exact ages of people with this background.

The plaintiffs sued one Kishongo Simba Carlo, the first defendant, who, while driving his volkswagen car on the night of 30 November 1965 at 9.30 p.m. came into collision with the Austin car driven by Issac Mowo the third defendant. It was said that the second defendant, one Clary Elfring owned the car driven by the third defendant. Although substituted service was effected against Miss Elfring on her last known place of business, namely the Y.W.C.A. at Moshi, it is not at all clear who she was, or whether she was indeed concerned with the car. Her liability will be considered after this judgment, as a separate matter.

It transpires that Alexander Job was a passenger in Mr. Mowo's car at the time of the accident and that as a result, he was killed. At the commencement of the trial Counsel for the defendants admitted that the deceased died as a result of the accident and amended their pleadings, to present a more consistent stand. I need not refer to the various amendments which are set out in the record except to say that they admitted para. 7 of the plaint. The admissions referred to above had the effect of reducing the issues between the parties to those framed, which are as follows:

- (1) Was the collision caused by the sole negligence of the 1st Defendant;
- (2) Was the collision caused by the sole negligence of the 3rd Defendant;
- (3) If they were both liable (1st and 3rd Defendants) and to what degree;
- (4) What are the respective dependancies;
- (5) To what damages are the plaintiffs entitled as dependants themselves as well as the other dependants:
 - (a) what damages is the estate entitled to (special damages claimed).

It is almost impossible from the evidence adduced, to ascertain which of the drivers was at fault. The

accident occurred on the main tarmacadamed road between Moshi and Arusha. The weather conditions seem to have been clear and dry. The defendant Carlo was ascending a hill about 4 1/2 miles from Moshi

when he observed the defendant Mowo's car come over the brow of the hill towards him. Mr. Mowo similarly saw Mr. Carlo's car. There was no obstruction or impediment preventing the cars passing in the normal manner. Unfortunately, they came into collision. It is to be observed that each driver claims to have been proceeding in an entirely exemplary manner at a moderate speed on his own side of the road. Each considers the other to have strayed from the path of virtue claimed, and to have encroached on to the wrong side of the road. But although they had sufficient distance within which to observe each other and take such evasive action as was necessary, they nevertheless, came into collision.

It had been hoped that Mr. Carlo's passenger would emerge from his obscurity in Kenya to throw some light on this riddle, and on the other hand, it was thought that the Police Officer who visited the scene might enlighten the court as to what he observed. But these witnesses were not forthcoming. In the result as there is nothing to choose between the evidence of Mr. Carlo and Mr. Mowo, I am of the opinion that they must both have been at fault. On the authority of *Bray v. Palmer*, [1953] 2 All E.R. 1449 and *Baker v. Market Harborough Co-op. Society*, [1953] 1 W.L.R. 1472, I divide the liability between them equally. That answers the first three issues framed.

On the question of the dependencies, I find, first of all, that the plaintiffs have claimed for the dependents named in the plaint on good grounds. The deceased's mother and father are still alive and his immediate family correctly listed. They were all dependant upon the deceased and that accordingly answers the fourth issue framed.

The real debate in this case concerns the quantum of damages to be awarded to the dependents, and it is a difficult point to answer on the evidence available. The following facts are however clear. The deceased was the eldest son of his parents, his father apparently not being a very active man at the time of the deceased's death. The deceased was born in 1933 and having reached class VI in 1948, he left school to join what was then called the Public Works Department to learn a trade. He went into the building trade. He soon left to undertake work with a private contractor and earned Shs. 2/- and then Shs. 3/- per day. He sent home Shs. 20/- or Shs. 25/- per month. He then left for Malindi Kenya where it is claimed he earned from Shs. 10/- to Shs. 20/- per day. He managed to send home Shs. 30/- per month. In 1955 he went to Mombasa and worked in the cement factory. That employment lasted until 1960. In 1958, he married Anna, and she bore him their first child at the end of that year. It is claimed that the deceased was paid Shs. 15/- per day to start with, ending at Shs. 25/-. He was able to send home Shs. 150/- or Shs. 200/-. According to Anna, while she lived with the deceased's family during her pregnancy in 1958, his total contribution was Shs. 250/-. After the birth of the first child Martha, she received her own money and her mother-in-law had a separate allowance. From this time onwards, the two families were not aware of what the other party was being paid. Then from 1961 to 1963, the deceased built a house for Chief Alfred Salakana, and his mother claimed to have received Shs. 300/- per month and his wife a similar amount. It seems that the deceased was expected to make some Shs. 10,000/- from building the house, but there is nothing to show whether this was the gross or nett figure. Then he worked for the contractor George Isaias; it is said as a supervisor, and although his salary was not stated, his mother claimed to have received Shs. 300/- per month in 1964 and his wife a similar sum. The latter claimed that finally the deceased gave Shs. 400/- per month. At the time of his death, the deceased had unfulfilled contracts worth fairly large sums and it seems that he may have been employing his own labourers. I find that the deceased had started as a labourer, and gradually built up his knowledge of the trade sufficiently to have

reached the foreman or supervisor grade. He may well have contracted to build Chief Alfred's house. It appears that he had a useful career ahead of him. But exactly how valuable his future occupation would have proved is indistinct because it is not clear whether he would have emerged as a full-time private contractor. Nor is it certain exactly how able he was. His family claimed that he was never without work; but Anna, who was much more candid than her mother-in-law, admitted that between June and October 1965, he had had no employment.

The deceased owned a kihamba of about one acre, and in 1965, he built himself a house there. His own family lived there at the time of his death. It is not rented in any way, and Anna has the produce from the land to sustain her. She claims it is not enough, but that she will cultivate other land and will support herself by her own efforts. It is not clear whether the deceased left her any savings of his own. Anna appears to have been thrifty and saved her own money, out of which during the months that the deceased had no work, she was able to provide him with funds to pay his allowance to his parents. It may well be that the deceased had spent his savings in building the house. I take it that Anna largely received the house and land from the deceased. He had no motor vehicle. He may have had some building tools and so forth, but I cannot say that the deceased's estate has provided Anna and his parents with anything, the value of which should be deducted from the dependency sum.

As to her future, Anna denied that she would not be "inherited" by any of the deceased's brothers. The deceased's father is still alive and there is no likelihood that Anna will receive anything more as part of her husband's inheritance from his father. She must depend upon her own efforts or re-marry. According to her, though she is young, her chances of re-marrying are nonexistent as she has four children. She does not appear to wish to re-marry. But that eventuality cannot be ruled out entirely, since with her award as the result of this case and those of her children, she may well find that life is not quite as bleak as it appears at present.

Coming then to the question of what his parents and his wife actually received from the deceased, one is met with conflicting evidence. Anna was good enough to admit that in 1965 the deceased had been unable to pay her regular sums. By the time of the accident she had received Shs. 1,200/- only in 1965. She also admitted that in 1964, the deceased had paid her Shs. 300/- per month when he was able to do so. No doubt she had confidence in the deceased's abilities to maintain his family at a higher level as time went on, but she was forced to admit that the deceased had paid rates and taxes at the lowest level. It seems unlikely that he had as yet reached a position where he could be called affluent in any sense, but his situation was reasonably solid, and he had fairly good prospects.

I was not at all impressed by the deceased's mother's evidence. The deceased may have been a good son and he may have done what he could when he was employed, but the large sums Hulda spoke of as having been earned by the deceased, are certainly mythological. It seems to me that the deceased could not have been paying out anything like Shs. 600/- per month, half to his mother and half to his wife in the last two years before his death. If he had managed to pay them Shs. 300/- per month alternately he would have done very well. An indication of Hulda's exaggeration, I think, can be gauged from her assertion that on the evening before his death he had hired Mr. Mowo's car to come to see her. She suggested that he was in a position to hire vehicles for this purpose. He had not hired it – he had been merely a passenger. In my view, the most that the deceased could have managed for both families was Shs. 250/- per month in a good period. In that figure I would allow for such extra items as clothing and household expenses as the deceased himself paid. But from that

sum, I would deduct Shs. 60/- per month as being the figure that was spent in his own upkeep and food. I find a figure of Shs. 190/- per month the basic dependency sum and that I think would take into account his future prospects.

The next problem is to consider the capital value of the dependency. The deceased was an active man by all accounts, of 30 years of age and in good health, and his wife a little younger and apparently in very good health. Perhaps such authorities as *Coles v. Hollis Bros. & Co.*, [1962] 1 L.R. 50, *Williams v. Richard Thomas & Baldwin Ltd. & Bros.* and *Fels v. Pyer*, noted in Kemp & Kemp (2nd Edn.), Vol. 2, are as useful guides as any concerning the factor to be adopted regarding persons of the age of the deceased and his wife. I was referred to the views expressed in *Martin Edmond Gaspar v. Meru Co-op. Union Ltd.*: an unreported case in the Court of Appeal correcting views expressed some years ago by this Court. Giving such consideration as I am able to the facts before me, I award Shs. 25,000/- as the general dependency.

Then there is the question of special damages claimed. Shs. 410/50 was claimed, of which Shs. 400/- was claimed as funeral expenses and Shs. 10/50 for a Police Report. Counsel for Mr. Mowo was not inclined to dispute these figures, but the first defendant did challenge them, and they were put in issue. There was no proof of the Police Report having been paid and therefore that item fails. As to the funeral expenses, although there was no documentary proof in the form of receipts, there was nothing in evidence to suggest that these figures are unreasonable. I accept that Shs. 400/- was paid for funeral expenses.

The total award then will be Shs. 25,400/-, and I divide it as follows:

Shs. 16,000/- to the deceased's wife.

Shs. 6,000/- to the deceased's parents.

Shs. 1,000/- for each daughter.

Shs. 700/- for each son.

There will be judgment for the plaintiffs in the sum set out above with costs, the liability in damages and costs to be shared equally by the defendants. The question of the second defendant's liability is left open for consideration.

Judgment for the plaintiffs.

For the plaintiff:

V. Dev Vohora

For the defendants:

D. Cassidy

Re Bird Deceased
[1970] 1 EA 289 (HCT)

Division:

High Court of Tanzania at Arusha

Date of judgment: 13 October 1969
Case Number: 12/1969 (33/70)
Before: Platt J
Sourced by: LawAfrica

[1] *Probate and Administration – Will – Revocation – Whether divorce revokes will – Whether divorced wife entitled to the property.*

Editor's Summary

The testator left all this property to his “wife Margaret Bird”. The will also provided for the devolution of the estate if the wife did not survive the testator. The testator divorced his wife. Later she remarried and became known as Margaret Fox. The testator had made one alteration in the will due to the death of his mother but the clause bequeathing all his property to “my wife Margaret Bird” was not altered. Margaret Fox applied for the probate of the will and for dispensation with verification.

Held –

- (i) divorce does not ipso facto revoke a will;
- (ii) as the applicant was the person referred to in the will as Margaret Bird she was entitled to the testator's property. (*In re Boddington, Boddington v. Clariat* (1) followed.)

Application allowed.

Cases referred to in judgment:

- (1) *In re Boddington, Boddington v. Clariat* (1883), 22 Ch. D. 597.

Judgment

Platt J: This is an application for grant of probate to Margaret Fox, formerly Margaret Bird, of the will of Robert William Stafford Bird, and the application involves two questions. The first is whether Margaret Fox having divorced the testator, is still entitled under the will to all the testator's property and to be appointed his sole executrix. Secondly, there is an application for dispensation with the verification of the petition for probate by one attesting witness of the will of the deceased.

Under cl. 3 of the will, the testator provided as follows:

“If my Wife Margaret Bird shall be living at the expiration of Seven (7) clear days (Excluding the day of my death) after my death I give her absolutely all my property of whatsoever kind and wheresoever situated and appoint her my sole Executrix” (sic).

The deletion of the reference to cl. 2 was effected by the testator because his mother, who had been provided for in cl. 2, had died. Therefore, so long as Margaret Bird was living after the period specified in cl. 3, she was entitled to all the testator's property and to be appointed his sole executrix. The will was dated 26 June 1951 and signed by the testator in the presence of the witnesses P. G. Bycroft and John P. Swaffin. The latter was an advocate who drew the will and I presume that the other witness was his

stenographer.

Then in September 1962, the testator and Margaret Bird were divorced. A daughter Jessica Bird and a son Peter Bird were the issue of the marriage. Later Margaret Bird remarried and is now known as Margaret Fox. The question then is whether the reference to “my wife Margaret Bird” is a sufficient and suitable reference to Margaret Fox so as to entitle her to the property of the testator and to be appointed executrix.

Clause 4 continues:

“If my said wife shall not be living at the expiration of the period aforesaid then the following provisions shall have effect.”

In the following paragraph, the testator appointed his sister and the brother of Margaret Bird to be executors and trustees of his will and guardian of his infant children and each executor, who should act, was given a legacy. Then the testator bequeathed all his real and personal property to the trustees upon trust for sale, to divide his residuary estate amongst his children living at the time of his death and his grand-children on certain terms. It follows that the will did not envisage the situation which might arise if the testator should divorce his wife Margaret Bird. The only condition to her receiving all the property and being appointed executrix was that she should be living at the time of the testator's death. But it might be thought that she must be his wife and that as she was not his wife at the time of his death, she must be excluded from the will.

Mr. Cassidy urged the court to take the view that the divorce had not caused a voluntary revocation of the will. Margaret Bird had been correctly described in the will as the testator's wife at the time that the will was made, and the testator having possession of the will and having made one alteration due to the death of his mother, must be taken to have intended that Margaret Bird was still to be entitled under cl. 3 of the will. No East African authority could be discovered, but he referred the court to Jarman on Wills (8th Edn.), Vol. 2, p. 1239, from which it would appear that a divorce does not ipso facto revoke the will. He also referred to Halsbury's Statutes, Vol. 34, where in dealing with the voluntary revocation of wills, the learned author sets out the only events in which such revocation would be effected. (See para. 107 of 2nd Edn. or Vol. 39, 3rd Edn., para 1354.) Nothing is stated as to divorce. The most useful authority quoted would appear to be *In re Boddington, Boddington v. Clariat* (1883), 22 Ch. D. p. 597, in which the testator by his will gave the proceeds of the sale of his residuary estate to trustees on trust to pay his wife Emily Caroline within one month after his decease, a legacy of £200, and in addition thereto, to pay to his said wife, “so long as she shall continue my widow and unmarried”, an annuity of £300, commencing from the date of his decease, “or otherwise in lieu and in substitution of the said annuity, at the option of my said wife, if she shall prefer it, a legacy of £2,000”. After the date of the will, the marriage was declared null on the ground of the impotency of the testator. The latter died without altering his will. It was held that the former wife was entitled to the legacy of £200, but that she could not claim the annuity, inasmuch as she never had been in law the wife of the testator and never could be or continue his widow. The annuity was therefore given for a period which could never come into existence. Fry, J. (as he then was) explained that there was no doubt about the identity of the person named in the will, since the misdescription could not be of importance, and that although she was described in the will as the testator's wife, which she was not at the time of his death and in law never had been, nevertheless, she was prima facie entitled to the legacy of £200. The Judge went on to consider the authorities, but held that there being no false assumption by the lady of the character of a wife, she was entitled to that legacy. At the same time, he refused to grant her the annuity because she could not properly be described as having been his widow. As far as the legacy of £200 is concerned, there is no material difference between the facts in Boddington's case and the instant case. It is true that Margaret Bird has remarried, but I cannot see that that can make any difference. Accordingly I am satisfied that Margaret Fox is the identical person to Margaret Bird, who was described by the testator as his wife, as indeed she then was. As the testator

did not alter his will, and as the divorce did not operate as a voluntary revocation, Margaret Fox is entitled, under cl. 3, to the testator's property and to be appointed his sole executrix. By way of strengthening the position, Counsel adduced the consents of the two children of the marriage to Margaret Fox being granted probate. I am also told that the two other executors have both deceased.

As to the second question, there is provision in s. 57 of the Probate and Administration Ordinance (Cap. 445) giving the court power to dispense "with verification by a witness where it is satisfied that it cannot be obtained, without undue delay or expense". Rule 34 of the Probate and Administration Rules provides the manner in which an application for an order for such dispensation should be made. I am satisfied from the evidence before me that J. P. Swaffin, one of the witnesses to the will, is dead, and that P. G. Bycroft cannot now be traced, as far as ordinary methods of investigation are concerned. It might be possible to arrange for an elaborate investigation, but it appears that having in mind that the value of the estate is quite small, such an investigation would lead to undue delay and expense. Accordingly I grant the application for the dispensation with the verification as generally required by s. 57 of the Ordinance.

In the result, probate is granted to Margaret Fox of the will of the testator Robert William Stafford Bird.

Application allowed.

For the applicant:

D. Cassidy

Uganda v Amisi
[1970] 1 EA 291 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	13 January 1970
Case Number:	58/ 1969 (54/70)
Before:	Phadke Ag J
Sourced by:	LawAfrica

[1] *Criminal Practice and Procedure – Charge – Duplicity – Driving motor vehicle recklessly or in a manner dangerous to the public – Charge bad for duplicity.*

[2] *Criminal Practice and Procedure – Charge – Duplicity – Prejudice to accused not a relevant consideration.*

[3] *Criminal Practice and Procedure – Charge – Duplicity – Objection may be taken for first time on appeal.*

[4] *Criminal Practice and Procedure – Minor offence – Power of court to substitute such a conviction*

after acquittal – Criminal Procedure Code (Cap. 107), s. 180 (U).

[5] Criminal Practice and Procedure – Case stated – Case cannot be stated after an acquittal – Magistrates Court Act, s. 29 (U).

Editor's Summary

The respondent was accused of causing death by a rash or negligent act, and of reckless driving. The particulars of reckless driving alleged that the respondent drove recklessly *or* in a manner dangerous to the public.

The magistrate acquitted the respondent on the charge of causing death, and held that the reckless driving charge was bad for duplicity although objection had not been taken for the respondent. On the submission of the prosecution

that the respondent be convicted of careless driving, the magistrate held that he could not do so after having acquitted the respondent of reckless driving. After judgment the prosecution applied for the acquittal to be made subject to the opinion of the High Court on a case to be stated under the Magistrate's Court Act, s. 29. The prosecution appealed before the case stated was heard, and the respondent objected that the appeal was therefore premature. The appeal was on the grounds that the magistrate erred in holding the reckless driving charge duplex, and in not convicting of the lesser offence of careless driving.

Held –

- (i) once the magistrate had given judgment without reserving any issue of law for the High Court his judgment was complete and could not therefore be made conditional;
- (ii) the appeal was therefore not premature;
- (iii) where a statute creates two offences it is not permissible to charge both offences by joining the particulars of both offences with *and*. There must be separate counts and particulars in respect of each charge;
- (iv) where a charge is bad for duplicity the question of whether or not there was prejudice to the accused is not relevant since the accused must know with precision the offence with which he is charged (*Shah v. Republic* (8) not followed);
- (v) after the dismissal of the reckless driving charge the magistrate could not convict of a lesser charge;
- (vi) objection to a charge on the ground of duplicity may be raised on appeal although not taken at the trial (*R. v. Molloy* (2) followed).

Appeal dismissed.

Cases referred to in judgment:

- (1) *R. v. Jones and others, Justices*, [1921] 1 K.B. 632.
- (2) *R. v. Molloy*, [1921] 2 K.B. 364.
- (3) *R. v. Surrey Justices ex p. Witherick*, [1932] 1 K.B. 450.
- (4) *R. v. Wilmot*, [1933] All E.R. Rep. 628.
- (5) *R. v. De Commarmond*, [1959] E.A. 64.
- (6) *R. v. Clow*, [1963] 2 All E.R. 216.
- (7) *Maithaka s/o Gichinga v. R.*, [1963] E.A. 627.
- (8) *Shah v. Republic*, [1969] E.A. 197.

Judgment

Phadke Ag J: The respondent was prosecuted for the offence of causing death by a rash or negligent act, not amounting to manslaughter, contrary to s. 219 A, Penal Code (Cap. 106). There was also an

alternative charge of reckless driving, contrary to s. 43 (1), Traffic Act (Cap. 342). The prosecution arose out of the death of a schoolboy named Dominiko Kayemba, aged about 12, who was knocked down by a motor vehicle driven by the respondent, on 6 June 1967, in the vicinity of Mile 57 on Mbarara to Masaka road.

The prosecution called six witnesses. The respondent gave sworn evidence and called one witness. At the conclusion of the evidence, counsel for the respondent submitted that the high degree of negligence under s. 219 A, Penal Code Act had not been established, and that the prosecution had also failed to establish the requisite degree of recklessness on the alternative charge under s. 43 (1), Traffic Act. For the prosecution, it was submitted that the respondent be convicted of the minor cognate offence of careless driving, contrary to

s. 45 (1), Traffic Act. Such a conviction, it was submitted, could be made by virtue of the provision in s. 180, Criminal Procedure Code (Cap. 107) which reads:

“When a person is charged with an offence and facts are proved which reduce it to a minor cognate offence, he may be convicted of the minor offence although he was not charged with it.”

In this connection, the prosecution should have referred to s. 45 (3), Traffic Act.

In his judgment the Acting Chief Magistrate did not make any findings of fact. With regard to the charge of rash or negligent act causing death he acquitted the respondent on the ground that the evidence showed that the death of the schoolboy was “inevitable as it was brought about by his sudden crossing to the opposite side of the road for reasons best known to himself”, and that the driver of the car in trying to save the life of the child caused his death. With regard to the alternative charge of reckless driving, he acquitted the respondent on the ground that the charge as framed was bad for duplicity in as much as the particulars alleged that the respondent had driven recklessly or in a manner dangerous to the public. Counsel for the respondent had not raised this objection but the Chief Magistrate held that it was his duty to consider the question. He relied upon the decision of the Supreme Court of Kenya in *Maithaka s/o Gichinga v. R.*, [1963] E.A. 627, which in his opinion was binding upon him. He also referred to the decision of the High Court of Kenya in *Shah v. Republic*, [1969] E.A. 197, in which reference was made to *Maithaka s/o Gichinga v. R.* With regard to the submission that the respondent be convicted of the minor offence of careless driving contrary to s. 45, Traffic Act, the Chief Magistrate held that he had no jurisdiction to do so as he had acquitted the respondent on the charge of reckless driving contrary to s. 43 (1), Traffic Act.

For the purpose of this appeal it is also necessary to refer to a further order made by the Chief Magistrate after delivery of the judgment, because at the hearing of this appeal counsel for the respondent submitted that the appeal was premature by reason of the further order. After delivery of the judgment, the prosecution applied that the acquittal be made subject to the opinion of the High Court on a case to be stated under s. 29, Magistrates’ Courts Act. This application was not opposed, and the Chief Magistrate made the following order:

“Order – A substantial law point is involved concerning the language of the charge in view of the two decisions quoted in my judgment which involves alternative count as laid under s. 43 (1), Traffic Act. I would also like to know from the High Court if I was bound to make findings of fact and then acquit or convict accused under s. 45 (3) on the application of Omondi.

For these reasons, I refer my judgment to the High Court and, I hereby order that the acquittal on the alternative count will not be effective until the High Court has expressed an opinion upon my judgment. Accused to report to High Court on 6 October 1969.”

The Chief Magistrate then forwarded copies of the proceedings and his judgment for the opinion of the High Court. It was pointed out to him that he had not complied with the appropriate procedure and in due course he forwarded a case stated in proper form. There is nothing in the record to show how, if at all, this case stated was dealt with by this Court. It would appear that it has never been dealt with, probably because on 6 October 1969, the prosecution filed a memorandum of appeal which is the subject of this present appeal.

As stated above, counsel for the respondent submitted that the appeal was premature because the respondent's acquittal under the judgment had been made conditional by the further order quoted above. The result was that there had been no acquittal and the right of appeal given to the Director of Public Prosecutions by s. 325, Criminal Procedure Code, had not arisen. I overruled this submission for the following reasons:

- (1) The question involves the interpretation of s. 29, Magistrates' Courts Act, which is as under:
"29. A magistrate may reserve for consideration by the High Court on a case to be stated by him, any question of law which may arise in any cause or matter before him or in any appeal before him and may give any judgment or decision subject to the opinion of the High Court."

This section certainly gives to a magistrate the right to *reserve* a question of law for the consideration of the High Court. I emphasise the word *reserve* used in the section. The question is – how is he to make use of this right? In my opinion, he is not permitted to make his decision on the question of law, state his decision in the judgment, and give a judgment based upon such decision. Once he gives judgment without expressly reserving it for the opinion of the High Court any issue of law and making the judgment subject to such opinion, his judgment is complete, and thereafter he has no jurisdiction to make it conditional upon the result of the case stated. Where the judgment is complete, the remedy of an aggrieved party is to lodge an appeal to the High Court.

- (2) It is to be noted that in Uganda there is no provision in the Criminal Procedure Code which permits an appeal by way of case stated from a decision by a lower court.
- (3) In the instant case, the Chief Magistrate did not reserve for the opinion of the High Court any question of law. He made his decision, incorporated it in his judgment, and in pursuance thereof acquitted the respondent. His judgment was decisive and complete in all respects and so also was the acquittal of the respondent. Thereafter, in making the acquittal conditional the Chief Magistrate erred in applying the provision in s. 29, Magistrates' Courts Act.
- (4) Upon the acquittal of the respondent under the judgment, the right of the Director of Public Prosecutions to appeal to the High Court came into existence under s. 325, Criminal Procedure Code, and also under s. 30, Magistrates' Courts Act.

I will now consider the matters which have arisen in this appeal. There is no appeal against the acquittal of the respondent on the charge of causing death by a rash or negligent act, and nothing more need be said about it. The appeal is against the acquittal of the respondent on the charge of reckless driving contrary to s. 43 (1), Traffic Act. It is submitted that the Chief Magistrate erred in holding that this charge was bad for duplicity, and also erred in refusing to convict the respondent on the lesser charge of careless driving contrary to s. 45 (3), Traffic Act on the ground that he had no jurisdiction to do so. For the respondent, it is submitted that the Chief Magistrate's decisions on these matters were correct, although counsel for the respondent conceded that the Chief Magistrate erred in treating the decision in *Maithaka s/o Gichinga v. R.*, *supra*, as binding upon him.

Duplicity.

Section 43 (1), Traffic Act, is as under:

- "43(1) Any person who drives a motor vehicle on a road recklessly or at a speed or in a manner dangerous to the public, having regard to all the circumstances of the case including the nature, condition and use of the

road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be on the road, shall be guilty of an offence and shall be liable on conviction to a fine not exceeding one thousand shillings or to imprisonment for a period not exceeding twelve months or to both such fine and imprisonment, and the court shall order particulars of any such conviction to be endorsed on any driving permit held by the person convicted.”

In this case the particulars in the charge sheet were stated as under:

“Captain Amisi Kairugavu, on or about 6 June 1967, at about mile 57 on Mbarara/Masaka road, in the Masaka District, being the driver of motor vehicle No. UEJ 806, drove the said vehicle recklessly or in a manner dangerous to the public, having regard to all the circumstances of the case including the nature, condition and use of the road and the amount of traffic which was actually at the time or which might reasonably be expected to be on the road.”

It is a well established principle of law that an indictment must not be double; that is to say no one count of the indictment should charge the accused with having committed two or more separate offences. The problem in the interpretation of s. 43 (1), Traffic Act, is the result of the use of the disjunctive “or” in the section. The question is whether the section creates one offence, or two or more separate offences, namely, driving recklessly or driving at a speed or driving in a manner which is dangerous to the public. I have been unable to find any decision of this Court or of the Court of Appeal for East Africa on this point. I have perused several English decisions and three decisions of the High Court of Kenya, including the two cited by the Chief Magistrate. I will hereinafter refer to these decisions in detail, but I would like to say at the outset that the view of the Chief Magistrate that he was bound by the Kenya decision in *Maithaka Gichinga v. R. (supra)* was erroneous. The decisions of that court can be persuasive and should be treated with great respect but they are not binding upon a magistrate in Uganda. The same is the position with English decisions.

I will now refer to the following decisions perused by me.

(1) *R. v. Jones & Others, Justices*, [1921] 1 K.B. 632. (Lord Coleridge, J., Avory, J., and Salter, J.)

The appellant was summoned under s. 1 of the Motor Car Act 1903, for and convicted of, driving a motor car on a highway “recklessly *and* at a speed which was dangerous to the public, having regard to all the circumstances of the case”.

Held, that as the driving of the car was one indivisible act which might constitute both the offences charged, the conviction was not bad for duplicity.

In his judgment, Lord Coleridge said: “It is true that under that section, which defines four separate offences, a person may be convicted of driving recklessly, or of driving negligently, or of driving at a speed which is dangerous to the public, or of driving in a manner dangerous to the public. The question is whether when that which the defendant has done is one act a conviction for driving the car recklessly and at a speed which is dangerous to the public is bad for duplicity. Several cases have been cited to us.”

His Lordship referred to *R. v. Wells*, *Coterill v. Lempriere*, and *R. v. Slater*. In each case the accused was charged under a section which created separate offences because of the use of the disjunctive word *or*, and the charge was held to be bad for duplicity.

In this case, as I understand the judgment, the conviction was upheld because the conjunctive *and* was used in the charge.

(2) *R. v. Surrey Justices, Ex parte Witherick*, [1932] 1 K.B. 450. (Avory, J., Swift J., and Humphreys, J.)

The appellant was convicted before justices on an information which charged him with driving a motor vehicle on a road “without due care and attention *or* without reasonable consideration for other persons using the road contrary to s. 12 of the Road Traffic Act 1930.”

Held, that the section created two separate offences and that the conviction was bad for duplicity, the appellant having been charged with those two offences in the alternative.

In his judgment, Avory, J., said: “On consideration of this section, I have come to the conclusion that it contemplates two separate offences. . . . It is an elementary principle that an information must not charge offences in the alternative, since the defendant cannot then know with precision with what he is charged and of what he is convicted and may be prevented on a future occasion from pleading *autrefois* convict.”

The learned judge referred to *R. v. Jones (supra)*, and remarked that a man might be properly convicted of driving “recklessly *and* at a speed which is dangerous to the public” since the act of driving was one indivisible act.

This judgment shows that the conviction was not upheld because the disjunctive “or” was used in the charge.

(3) *R. v. Wilmot*, [1933] All E.R. Rep. 628. (Lord Hewart, L.C.J., Avory, J., and Humphreys, J.)

The appellant was convicted on a count of an indictment charging him with dangerous driving, contrary to s. 11 (1) of the Road Traffic Act 1930, the particulars of the offence being stated as follows:

“C.W., on 25 October 1932, on a certain road . . . in the county of Lincoln, drove a motor car recklessly *or* at a speed *or* in a manner dangerous to the public having regard to all the circumstances of the case, including the nature, condition and the use of the road and the amount of traffic which was actually at the time or which might reasonably have been expected to be, on the said road.”

Held that the count was bad for duplicity, in that it charged more than one offence in the alternative, and therefore the conviction must be quashed.

The decision in *R. v. Surrey Justices, Ex parte Witherick (supra)* was applied.

It is clear from this judgment that it was the use of the disjunctive “or” in the particulars of the charge which made this case different from *R. v. Jones (supra)* but similar to *R. v. Surrey Justices (supra)* which was followed. It is significant to note that Avory, J., was one of the judges in the three cases referred to above, and Humphreys, J., was one of the judges in two of them.

(4) *R. v. De Commarmond*, [1959] E.A. 64 (Kenya). (Sir Ronald Sinclair, C.J., and Rudd, J.)

The respondent was acquitted by a magistrate of a charge of causing death by driving a motor vehicle “at a speed *and* in a manner dangerous to the public” contrary to s. 44 A of the Traffic Ordinance 1953, on the ground that the charge was bad for duplicity.

Held, that the respondent’s act of driving, though it might have been both at a speed and in a manner dangerous to the public was one and indivisible and accordingly was properly the subject of a single count.

The acquittal was set aside.

In his judgment, Sir Ronald Sinclair, C.J., discussed the decisions in *R. v. Jones*, *R. v. Surrey Justices*, and *R. v. Wilmot*. Perusal of the judgment shows that although in s. 44 A the disjunctive “or” was used, the particulars of the charge contained the conjunctive “and”.

(5) *Maithaka s/o Gichinga v. R.*, [1963] E.A. 627 (Kenya). (Rudd, J., and Wicks, J.)

One of the charges against the appellant was of reckless driving and the particulars of the charge stated that he drove a motor vehicle in a reckless manner and at a speed which was dangerous to the public contrary to s. 47 (1) of the Kenya Traffic Ordinance. The magistrate relying upon *R. v. Wilmot* acquitted the appellant on the ground that the count was bad for duplicity.

Although there was no appeal against the acquittal, the court considered the question of duplicity.

Held, (i) where separate offences are charged in the alternative, that is disjunctively, using the word “or”, then separate offences are charged in one count which is bad for duplicity, but it is permissible to charge them conjunctively using the word “and” if the matter relates to one single act; (ii) since the charge against the appellant had been expressed conjunctively and the particulars referred to one incident or act, namely, the appellant’s driving of the motor car at the relevant time, the charge should not have been rejected for duplicity.

In his judgment, Rudd, J., referred to *R. v. Wilmot* and made observations for the future guidance of magistrates and others concerned with the prosecution of traffic offences.

(6) *R. v. Clow*, [1963] 2 All E.R. 216. (Lord Parker, L.C.J., Ashworth, J., and Winn, J.)

The appellant was charged with causing death by dangerous driving, contrary to s. 1 of the Road Traffic Act 1960, the particulars of the indictment being that he caused the death of one F.C. by the driving of a motor vehicle on a road at a speed *and* in a manner which was dangerous to the public having regard to all the circumstances of the case. A submission that the charge was bad for duplicity was overruled by the trial judge (Widgery, J.) and the appellant was convicted.

Held, that the appellant had been rightly convicted and the indictment was properly drawn, because even if the offences charged were separate offences, it was permissible to charge them conjunctively where, as in the present case, the matter related to one single incident.

It will be observed that the conjunctive “and” was used in the particulars of the charge, and Lord Parker in his judgment said: “Accordingly, however illogical it may seem, the line of authority is clear, and is supported by Lord Coleridge, Avory, J. and Humphreys, J. and others to the effect that, even if there are separate offences, yet it is permissible to charge them conjunctively, as in the present case, if the matter relates to one single incident.”

The cases which I have referred to above and examined in detail relate directly to the point in issue. The English decisions indicate the view that although a statutory provision may create two or more separate offences in the alternative by using the disjunctive “or”, it is permissible to formulate the charge conjunctively in respect of all by using the word “and” if the offences relate to the same incident. The Kenya decisions indicate the same view based upon the English decisions. None of the judgments explain why it is permissible to alter the disjunctive “or” in the statutory provision to the conjunctive “and” in the particulars of the charge and thereby avoid duplicity. Indeed, Lord Parker

in *R. v. Clow* (*supra*) remarked that this seemed “illogical”, and the reason he gave for this view was that the “line of authority” supported it. In the absence of any other explanation, such as the existence of some statutory provision which permitted the alteration of the disjunctive “or” in an enactment to the conjunctive “and” to be used in the particulars of the charge, I have found it difficult to appreciate the reasons for this view. I have been unable to trace any such statutory provision. It is necessary to consider whether any provision in the Uganda Criminal Procedure Code makes the alteration permissible. Counsel for the appellant referred to s. 136 (b) (i). This section states – “where an enactment constituting an offence states the offence to be the doing or the omission to do any one of any different acts in the alternative . . . the acts, omissions, . . . or other matters stated in the alternative in the enactment, may be stated in the alternative in the count charging the offence.” This section does not help because it speaks of stating the alternative in the count which is quite different from the statement of *particulars* required to be given under s. 133.

There remains to consider the decision of the High Court of Kenya in the recent case of *Shah v. Republic*, [1969] E.A. 197. In this case, the appellant was charged with three counts. Two of these counts were in respect of causing the deaths of two named persons by driving a motor car at a speed or in a manner dangerous to the public. Mosdell, J., referred to several authorities and held that the charge was not bad for duplicity. The judge further observed – “With the injection of some common sense into the matter, which the authorities seem somewhat reluctant to allow, it seems to me that the appellant was not by one iota prejudiced by the disjunctivity of the particulars of the offences in counts 1 and 2. He knew that he had to meet an allegation of causing two deaths by driving at a speed *and* in a manner dangerous to the public. It seems to me that an accused is in no more worse position when the particulars of the offence are framed disjunctively than when they are framed conjunctively.”

This was a different approach to the problem – that of prejudice or no prejudice to an accused. Counsel for the respondent submitted that this was not a correct approach because where a charge is bad for duplicity and inherently bad the question whether an accused would be prejudiced or not was not relevant. I agree with this submission. With respect to Mosdell, J., I am of the opinion that the question is fundamental and should not be determined by the application of such consideration as he had in mind. I respectfully prefer the view of Avory, J., in *R. v. Surrey Justices* (*supra*) that the accused should know with precision the offence with which he is charged.

I have expressed above my difficulty in locating some express statutory provision in support of the reasoning in the English decisions. I have also endeavoured to illustrate that even if these decisions have the support of some statutory provision which I have been unable to locate, they cannot as a matter of course be followed in Uganda unless some provision in the Criminal Procedure Code makes this possible. I have also expressed the view that s. 136 (b) (i) is not such a provision. It is my opinion, therefore, that the English decisions cannot be followed in Uganda. It is my view that in Uganda when a person is charged with the commission of any one or more of the separate offences created by s. 43 (1), Traffic Act, each alleged offence should be the subject of a separate count and information relevant to that count should be stated in the particulars relating thereto. However, if I am wrong in the view I have taken, I consider that the decision in *R. v. Wilmot* (*supra*) fully applies to the circumstances of the present appeal. It was this decision which was followed in *Maithaka s/o Gichinga v. R.*, and I am of the opinion that the Chief Magistrate did not err in law following the principles relied upon in *Maithaka*’s case.

For the reasons given above, I have reached the conclusion that the Chief

Magistrate was right in his decision that the alternative count was bad for duplicity, and I uphold his judgment dismissing the charge and acquitting the respondent.

Section 45 (3), Traffic Act

This section permits, in the light of the evidence before the court, a conviction for the lesser offence of careless driving. As stated above, the Chief Magistrate did not make findings of fact, and although it would have been desirable so to do it was not strictly necessary as on a point of law he dismissed the substantive charge in the alternative count. Upon dismissal of this count and acquittal of the respondent, the Chief Magistrate had no jurisdiction to substitute in its place a conviction for a lesser offence.

Finally, I will refer to *R. v. Molloy*, [1921] 2 K.B. 364, where it was held that although an objection to a charge on the ground of duplicity is not raised at the trial, it is permissible to raise it on appeal. I respectfully agree. A point of law which went to the very root of the charge was involved and counsel for the respondent was entitled to raise it on appeal. Likewise the Chief Magistrate was right in considering it of his own accord although not raised at the trial.

In the result, the appeal is dismissed.

For the appellant:

F. M. Ssekandi (Senior State Attorney)

For the respondent:

P. V. Parekhji (instructed by *Parekhji & Co.*, Kampala)

Mwanyi Dealers Ltd and others v Sezibwa United Farmers Ltd and others
[1970] 1 EA 299 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	3 January 1970
Case Number:	20/1969 (59/70)
Before:	Mukasa Ag J
Sourced by:	LawAfrica

[1] *Civil Practice and Procedure – Judgment – Declaratory judgment – Standards for granting – Discretion of judge – Whether judgment would terminate litigation between parties.*

[2] *Company – African – Company is non-African for purposes of acquiring mailo land if transfer of shares is not restricted to Africans by Articles of Association – The Land Transfer Act (Cap. 202), s. 2 (b) (U.).*

[3] *Company – Director – Removal – Special notice of general meeting – Failure to give all members*

notice in due time avoids removal of directors.

[4] Company – Shares – Ownership – Effect of non-African company acquiring mailo land in contravention of Land Transfer Act (Cap. 202) (U.) – No effect on ownership of shares.

Editor's Summary

The plaintiff company and three individual plaintiffs sought a declaratory judgment that a resolution passed by the defendant company electing the individual defendants as directors of the defendant company was null and void, and that the fifth defendant was not a director of the defendant company. Injunctions are also sought to restrain the defendants from giving effect to the resolution; to restrain the individual defendants from managing the defendant company without authority of the board of directors; and to restrain the individual defendants from operating the defendant company's bank account.

The defendant company was a public company with limited liability. On 6 August 1960 at a meeting of the directors of the defendant company, who were also all of the members of the defendant company, controlling interest was allotted to the plaintiff company. The number of directors was set at six, three Africans and three nominees of the plaintiff company. The individual plaintiffs are the nominee directors.

On 8 August 1966 the defendant bought a piece of mailo land and transferred title to itself without the consent of the Minister as required by the Land Transfer Act. On 29 October the Registrar of Companies wrote the plaintiff company stating that it had unlawfully taken shares in the defendant company because the latter owned mailo land and the plaintiff company was owned entirely by non-Africans.

On 1 November 1968 the secretary of the defendant company notified the plaintiff company that it was no longer a member of the defendant company and that a meeting was to be held on 14 November 1968. At this meeting the three African directors passed resolutions terminating the nominee representation on the board of directors; appointing the fifth defendant director; and constituting themselves a negotiating committee for determining the disposition of the shares held by the plaintiff company.

The principal issues raised were: whether the defendant company was an African company; whether the allotment of shares to the plaintiff company was proper; whether the individual plaintiffs were validly removed as directors; and whether the appointment of the fifth defendant as a director was valid.

Held –

- (i) the defendant company was a non-African company for purposes of the Land Transfer Act since transfer of its shares was not restricted to Africans;
- (ii) the Land Transfer Act has no effect on the ownership of shares in a company;
- (iii) the shares were properly allotted;
- (iv) he required special notice to call a general meeting had not been given to all the members of defendant company;
- (v) thus the actions at the meeting of 14 November 1968 were null and void in so far as they purported to dismiss and appoint directors;
- (vi) this was a proper case for the issue of a declaratory judgment.

Judgment for the plaintiffs.

Cases referred to in judgment:

- (1) *Gray v. Spyer*, [1922] 2 Ch. 22.
- (2) *Serwano Wofunira Kulabya v. Mistry Amar Singh*, [1961] E.A. 157.
- (3) *Ellis v. Bailey & Co. (E.A.) Ltd.*, [1962] E.A. 626.

Judgment

Mukasa Ag J: In this suit Mwanyi Dealers Ltd. (hereinafter referred to as the plaintiff company) and the second, third and fourth plaintiffs who claim to be three of the directors of Sezibwa United Farmers Ltd.

(hereinafter referred to as the defendant company) seek a declaration that a resolution passed by the defendant company whereby the second, third, fourth and fifth defendants were elected directors of the defendant company is null and void and of no effect; declaration that the fifth defendant is not a director of the defendant company and an injunction to restrain the fifth

defendant from acting as director of the defendant company, an injunction restraining the defendant company, the second, third and fourth defendants from giving effect to the said resolution of the defendant company, an injunction restraining the second, third and fourth defendants from managing the affairs of the defendant company without the authority of the Board of Directors of the defendant company of which the second, third and fourth plaintiffs are members; and lastly an injunction restraining the second, third, fourth and fifth defendants from operating the defendant company's bank account with the Uganda Commercial Bank. The claim arises out of certain events which occurred between 14 and 19 November 1968. It is alleged that a resolution dated 14 November 1968 was filed with the Registrar of Companies on 19 November 1968 informing him the change of directors of the defendant company. The names of the second, third and fourth plaintiffs were left out and that of the fifth defendant was added to the list of the directors. This resolution was signed by the second defendant as a director of the defendant company.

Most of the facts were agreed upon by both parties to the suit and they are briefly as follows:

On 16 February 1965 the defendant company was incorporated in Uganda as a public company with limited liability. The share capital was of Shs. 100,000/- divided into 10,000 shares each of Shs. 10/-. Seven members who each held one share were the first directors of the defendant company, and the second, third and fourth defendants were among these.

On 6 August 1966, the plaintiff company, a private limited liability company entirely owned by the second, third and fourth plaintiffs acquired 6,000 shares of the defendant company. The second, third and fourth plaintiffs did not acquire any shares in the defendant company in their own right. The 6,000 shares were by a resolution passed by all the directors allotted to the plaintiff company on that day. On the same day the same persons passed another resolution agreeing that the number of directors of the defendant company at all times be reduced to six. Three of these were to be Africans and the other three were to be selected or nominated by the directors of the plaintiff company.

Four of the original directors tendered their resignations and the plaintiff company selected the second, third and fourth plaintiffs as the three directors of its choice to be added to the other remaining directors, namely, the second, third and fourth defendants, in order to make up the required number of six directors of the defendant company. That same resolution seems to have made the second plaintiff the managing director.

On 8 August 1966 the defendant company bought a piece of mailo land from one person. This land was duly transferred to the defendant company and, I understand, it is the one upon which the coffee factory owned by the defendant company was built.

Although the defendant company did not contain a clause in its articles of association prohibiting transfer of its shares to non-Africans, no attempt was first made by its directors to obtain the consent of the Minister before the land was registered in its name, as the Land Transfer Act (Cap. 202) requires.

However the defendant company carried on business. It seems the old directors did not get on well with the other directors who are now plaintiffs.

On 29 October 1968 the Registrar of Companies wrote a letter to the plaintiff company pointing out that it had unlawfully taken shares in the defendant company for the latter company owned mailo land, and as the plaintiff company was owned entirely by non-Africans, the defendant company was then contravening the provisions of the Land Transfer Act. The Registrar thereafter

offered some unsolicited advice to the plaintiff company which I believe it declined to follow. The letter was copied to the defendant company.

The Secretary, or one acting as such for the defendant company, on 1 November 1968 sent out the following notice to the plaintiff company:

M/s Mwanyi Dealers Ltd.,
P.O. Box 1923, Kampala.

Sezibwa United Farmers Ltd.,
P.O. Box 177, Mukono.

1/11/68

Dear Sirs,

Meeting Notice

Reference to Registrar of Companies letter dated 29.10.68 addressed to you informing you that you wouldn't be among the members of this company now.

We invite you to attend the meeting on 14 November 1968 at 2.00 p.m. on the Factory at Seta to solve the problem.

Yours,
Sgd. Kefa Mulamba,
Secretary.

c.c.

Jashibhai Ishwarbhai Patel,
Jashibhai Ranchodbhai Patel,
Chaturbhai Shivabhai Patel,
E. K. Sali,
M. Katumba.

On 14 November 1969, the second, third and fourth defendants unanimously resolved that as the Registrar of Companies' letter dated 29 October 1968 had stated that no non-African could own shares in the defendant company the other three directors, who were representing the plaintiff company owned by non-Africans, must have their directorship terminated. That they (the remaining directors) would negotiate with the plaintiff company with regards to what would become of their 6,000 shares. It was also resolved that Mr. Willy Sekatawa be appointed another director.

Notification of this change of directors was filed with the Registrar of Companies on 19 November 1968. Then the plaintiffs brought action claiming all those reliefs which I referred to earlier on.

At the hearing of this suit parties hereto framed the issues as follows:

- (1) Whether the defendant company is an African company within the meaning of the Land Transfer Act or not.
- (2) Whether the allotment of 6,000 shares to the plaintiff company was valid or not.
- (3) Whether the second, third and fourth plaintiffs were validly removed by the resolution dated 14 November 1968 or not.
- (4) Whether the appointment of the fifth defendant as director of the defendant company was valid or not.

Section 2 (b) of the Land Transfer Act provides part of the answer to the first issue. It reads as follows:

"For the purpose of this section only, a company duly registered under the Companies Act all the members of

which are Africans and which contains in its articles of association a clause preventing the transfer of any of its shares to a non-African shall be deemed to be an African. No member of such company shall hold shares in trust for a non-African.”

Unfortunately, there is no clause in the articles of association of the defendant company which prevents such a transfer of any of its shares. It follows then, right from its incorporation, the defendant company was a non-African company. It surprises me to see that the Land Office registered the mailo-land transaction of the defendant company without first requiring it to comply with the above provisions. However, be that as it may, the remedy for the mistake then made is not for me to correct in these proceedings now. Appropriate steps will be taken by those concerned in due course, since the defendant company cannot in law hold mailo land without the necessary consents having been obtained. It is immaterial whether the plaintiff company pulls out of it or not for still it will remain a “non-African” without the necessary clause being in its articles of association.

I now turn to the second issue.

As I said earlier on, the articles of association of the defendant company were not against such an allotment.

The land acquisition matter was not yet in contemplation, for the allotment was on 6 August 1966, long before land was bought on 8 August 1966.

Section 4 of the Land Transfer Act affects African Companies which turn out to be non-African after they have acquired land. It has no application to this matter now before the court. There was a resolution signed by all the then shareholders on 6 August 1966, which authorised the directors to issue these shares. That is why, I think, even in the last resolution which purported to expel the other three Asian directors, the other African directors took it upon themselves to negotiate as to what would happen to these shares for they too regarded them as duly allotted to the plaintiff company.

Lastly, article 13 of the defendant company reads as follows:

“Subject to the provisions of these presents, the unissued shares of the company shall be at the disposal of the Board, which may allot, grant options over or otherwise dispose of them to such persons, at such times and for such consideration and upon such terms and conditions as the Board may determine, but so that no shares shall be issued at a discount except in accordance with s. 59 of the Ordinance.”

The meeting of 6 August 1966 was of the board of directors of the defendant company (who were also the only shareholders in that company). They had power to do what they did with those 6,000 shares which they allotted to the plaintiff company. The allotment was and is therefore valid.

As to the third and fourth issues, whether the plaintiff directors were validly removed on 14 November 1968, much depends on the procedure adopted prior to this meeting vis-a-vis the articles of association of the defendant company, for the defendant company excludes the operation of Table A of the Companies Act.

Article III is the one containing the provisions to be followed. It reads as follows:

“The Company may by ordinary Resolution of which a special Notice shall be given remove any directors before the expiration of his period of office, and may by an Ordinary Resolution appoint another person in his stead.”

It contains the gist of the contents of s. 185 of the Companies Act, regarding removal of a director of a public company.

Was the special notice to call a general meeting of the defendant company ever given to all shareholders? In other words, is the notice set out above

to be taken as a special notice calling a general meeting for the purpose of dismissing the second, third and fourth plaintiffs and appointing the fifth defendant as director?

I think not. The notice is a different document altogether. It appears to have been intended only for the directors in the defendant company although a copy was sent to the plaintiff company, the owner of the 6,000 shares. I come to this conclusion from the fact that Mr. Mayega the Higher Executive Officer in the office of the Registrar of Companies testified that by 30 November 1966 the shareholders in the defendant company according to the lists which were so far filed had gone up to a total of 131 members. A total of 6,277 shares had been issued and allotted to these 131 members, but the plaintiff company was the one holding the majority of these shares at 6,000. The rest each held one or two shares. Then the notice which went to only about three or four shareholders was not a notice to all shareholders entitled to attend the general meeting, let alone its being not "Special Notice" for it was for only 14 days.

It follows then whatever business was transacted on 14 November 1968 was not properly transacted. It is null and void.

The plaintiff directors were never validly dismissed and the fifth defendant was never validly elected as director of the defendant company.

I said earlier on that the resolution of all the shareholders on 6 August 1966 seems to have appointed the third plaintiff managing director for this is what it said at the bottom:

"(2) . . .

Resolved that the Management of the Company shall be done by Jashibhai Ranchodbhai Patel."

At the hearing of this suit the second plaintiff, who testified on behalf of the plaintiff company, and I believe on his own behalf, as well as the other two plaintiffs, denied it. This is what he said:

"I was by then managing the defendant company business along with the defendant directors but I was not a managing director so appointed. In fact they locked my office with their own lock. From that day I was not allowed to engage into the management of the defendant company's business.

The other plaintiff directors never engaged in management of the defendant's business. It was I alone who did so."

It would appear then that if the meeting of the 14 November 1968 had intended to be of the board of directors, they could have dismissed the second plaintiff from the capacity of managing director as distinct from that of director. This then would have justified their locking him out of the office. See *Peter G. Ellis v. M. G. Bailey & Co. (E.A.) Ltd.*, [1962] E.A. 626.

The post of managing director takes the usual law of master and servant and as the board of directors governs the affairs of the company, they can, rightly or wrongly at the risk of the company's being sued for damages for wrongful dismissal, dismiss a managing director from that post. In the present case I think no complaint was made of such dismissal, since the person who was locked out was not the one who was appointed as such by the defendant company. Perhaps that is why advocate for the plaintiff left that out completely.

Now with regard to the claims made, most of them seem to be of declaratory nature, apart from the injunctions sought to restrain the fifth defendant from acting as director and the other defendant from operating the company's banking account without the plaintiff's authority.

I do not think that it can be doubted that this court has jurisdiction to grant the declarations sought, but the power to make a declaratory judgment is a discretionary one – and the discretion must be exercised with care and caution and judicially, with regard to all the circumstances of the case. See Halsbury's Laws of England (3rd Edn.), Vol. 22, p. 349.

The Court will watch with care a claim for a declaration which is not followed by a claim for consequential relief: where the declaratory judgment cannot be expected to terminate the litigation between the parties, and this is what Lord Sterndale, M.R., had to say about it in the case of *Gray v. Spyer*, [1922] 2 Ch. 22:

"I agree with him that claims for declarations should be carefully watched. Properly used, they are very useful; improperly used, they almost amount to a nuisance. In this case, however, as the matters stood at the issue of the writ, I think the plaintiff's claim for a declaration was a convenient method to ascertain the legal position of the parties without waiting for the time when the notice terminated; and it might well be for the benefit of both parties to have it so determined."

I am satisfied therefore that this would be the position here.

The case which was brought to my notice of *Serwano Wofunira Kulabya v. Mistry Amar Singh*, [1961] E.A. 157 has no application at all to this present case. That case was by a landlord who had unlawfully tried to lease mailo land contrary to the Land Transfer Act, who was suing to get back his land, after the illegal acts had taken place. It would only be applicable if the person who transferred the land to the defendant company was the one now suing the defendant company to get back the land, but this is not the case.

I was unable to follow Mr. Musaala's arguments to the effect that the plaintiff company should lose its shares, because the proceeds from the sale of these shares were used in putting up a factory on mailo land in contravention of the Land Transfer Act. What the plaintiff company has now are the shares and not the value for which the shares were bought. The mailo land is not the only possession of the defendant company. Even if one may tend to agree that the plaintiff company being a non-African cannot possess the land in question there are still plenty of other possessions of the defendant company which the plaintiff company could legally own.

There is no force in Mr. Musaala's other argument that the plaintiff directors were also unlawfully elected on 6 August 1966 as no notice of that meeting in which they were selected and/or appointed was ever given to the members and that no general meeting within the meaning by articles 56 and 57 of the defendant company was convened.

True, article 57 requires all meetings in which special resolutions will be called for, to have 21 days' notice in writing, but the proviso to this same article authorises notice of shorter period than that if it is so agreed upon by all the members entitled to receive the required notice.

Who were then required to receive the notice for the meeting of 6 August 1966? All the shareholders of the defendant company. But these were only seven in number and these were the directors of it. These were all there at that meeting of 6 August 1966 and passed the resolution appointing the plaintiff directors.

Then if this was considered as a non-observance of a mere formality that does not make the notice of the meeting of 6 August 1966 insufficient. See Halsbury's Laws of England (3rd Edn.), Vol. 6, at p. 335.

Moreover, neither the defendant company nor any other interested party

sued to restrain the defendant company from acting on the resolutions which were passed.

It is very disingenuous for anyone now to ask this court to hold it that way, and this court will not be disposed to listen after such a long delay.

For the above reasons I have given therefore this suit succeeds.

There will be judgment for the plaintiffs as prayed in the plaint, and I order accordingly.

Judgment for the plaintiffs.

For the plaintiff:

J. C. Patel

For the defendant:

P. Musaala (instructed by *Musaala & Co.*, Kampala)

Obadiah and others v Dasan and others
[1970] 1 EA 306 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	15 December 1969
Case Number:	7/1968 (48/70)
Before:	Russell Ag J
Sourced by:	LawAfrica

[1] Appeal – Extension of time – Time for appeal provided by statute – Whether Civil Procedure Rules apply to allow extension of time for appeal – Trustee Incorporation Act (Cap. 147), s. 16, The Trustee Incorporation (Application and Appeal) Rules, r. 11, Civil Procedure Act (Cap. 65), s. 93 (U.).

Editor's Summary

The Minister of Mineral and Water Resources made an order in respect of an application alleged to have been made by the registered trustees of African Greek Orthodox Church, under the Trustee Incorporation Act (Cap. 147). The order is binding, but a right of appeal within thirty days and in accordance with rules of court is given to any aggrieved person. The applicants applied for leave to appeal out of time as they had not been given notice of the order. Rule 11 (4) of the Trustees Incorporation (Application and Appeal) Rules provided that the Civil Procedure Rules relating to practice and procedure applies so far as practicable and so far as consistent with the Act.

Held –

- (i) there is no power to extend the time for filing the appeal under the Civil Procedure Act, s. 99, since the period allowed for appeal is not fixed by the Act;
- (ii) an application for an extension of time to appeal is a matter of procedure (*Manibhai Blailalbai Patel v. Mehal Singh and Mela Singh* (4) followed);
- (iii) the court had power to extend the time for appeal.

Application allowed.

Cases referred to in judgment:

- (1) *In re Oliver and Scott's Arbitration* (1890), 43 Ch. D. 310.
- (2) *In re The Plymouth Breweries Ltd.*, [1918] 1 K.B. 573.
- (3) *Mansion House Ltd. v. Wilkinson* (1954), 21 E.A.C.A. 98.
- (4) *Manibhai Bhailalbai Patel v. Mehal Singh and Mela Singh* (1956), 23 E.A.C.A. 209.
- (5) *Mityana Ginners Ltd. v. Public Health Officer, Kampala*, [1958] E.A. 339.

Judgment

Russell Ag J: On 17 August 1968 the Minister of Mineral and Water Resources in exercise of the powers conferred on him by s. 16 of the Trustee Incorporation Act (Cap. 147) granted an application purporting to have been made by the registered trustees of the African Greek Orthodox Church for the change of the name of the incorporated body to “The Registered Trustees of the African Orthodox Autonomous Church” and the adoption of a new device for its seal and amended rules and objects. The Minister’s order is by s. 16 (1) of the Act conclusive and binding for all purposes but under s. 16 (2) any person who considers himself aggrieved by the order may within thirty days of the making thereof appeal to the High Court in accordance with any rules of Court made in that behalf and the High Court presumably has jurisdiction to review and set aside or vary the said order.

The applicants, whom I am prepared to accept as persons aggrieved by the said order, have lodged a notice of motion dated 25 November 1968 for leave to appeal out of time pursuant to The Trustees Incorporation (Application and Appeal) Rules made by the Rules Committee pursuant to s. 2 of the Courts (Rules) Act by the Chief Justice. Rule 6 of these Rules provides for the filing of a memorandum of appeal within the time limited by the Act (i.e. thirty days) and r. 11 (4) provides that the Civil Procedure Rules relating to practice and procedure shall apply as far as practicable save and in so far as they may be inconsistent with anything contained in the Act.

Counsel for the applicant has referred me to ss. 99 and 101 of the Civil Procedure Act (Cap. 65), O. 47, r. 6 of the Civil Procedure Rules and the judgment in *Mityana Ginnners Ltd. v. Public Health Officer, Kampala*, [1958] E. A. 339 in support of his application. Counsel for the respondent has referred me to the same section, rule and judgment but argues that they all support his contention that this Court does not have jurisdiction to enlarge the statutory period of 30 days for filing an appeal enacted by the Act.

It appears to me that s. 99 of the Civil Procedure Act does not assist the applicant as it only empowers the court to enlarge any period fixed or granted by the court for doing any act prescribed or allowed by that Act and the period for filing the appeal in the instant proceedings was not fixed by that Act or granted by the court but prescribed by The Trustees Incorporation Act.

The *Mityana Ginnners Ltd.* case can be distinguished from the present proceedings as the main issues decided by the Court of Appeal are briefly but sufficiently summarised in the head note as follows:

- “(i) since the appeal to the district court was not commenced in any manner prescribed by Rules to regulate the procedure of the courts, that appeal was not a “suit”, and the decision of the magistrate was an order and not a decree. *Mansion House Ltd. v. Wilkinson* (1954), 21 E.A.C.A. 98 adopted.
- (ii) if the order was appealable at all, it was so under s. 77 (1) of the Civil Procedure Ordinance, but the order was not within any of the categories referred to in O. 40, r. 1, and in any event would, under r. 1, sub-r. (2) require leave which was never asked for or given.”

In the instant application the Act has not only specifically enacted that there is a right of appeal but The Trustees Incorporation (Application and Appeal) Rules have been promulgated. Rule 6 of those Rules sets out the duties of the Registrar on the filing of an appeal “within the time limited by the Act” and r. 11 (4) (which corresponds to O. 47, r. 4 of the Kenya Civil Procedure Rules) reads:

- “(4) Save in so far as they may be inconsistent with anything contained in the Act or these Rules, the provisions of the Civil Procedure Rules

relating to practice and procedure shall apply as far as practicable to the appeal as they apply to appeals from a subordinate or magistrate's court."

Section 93 of the Civil Procedure Act reads:

"93. The procedure provided in this Act in regard to suits shall be followed as far as it may be applicable in all proceedings in any court of civil jurisdiction"

and corresponds to s. 89 of the Kenya Civil Procedure Ordinance, and in the judgment of the Court of Appeal in *Manibhai Bhailalbhai Patel v. Mehal Singh and Mela Singh* (1956), 23 E.A.C.A. 209 commencing at the bottom of p. 210 it was held:

"In our view that ruling does not accord with the true effect of the relevant provisions of the Civil Procedure Ordinance and of the rules made thereunder. Section 89 of the Ordinance is in the following terms:

'The procedure provided in this Ordinance in regard to suits shall be followed as far as it may be applicable in all proceedings in any court of civil jurisdiction.'

There can be no doubt, of course, but that the appellant's application for an extension of time was a 'proceeding' in a 'court of civil jurisdiction'. We must therefore determine the extent to which that section is applicable to the instant case.

In the first place there is O. 47, r. 4 which reads as follows:

'Any special rules of procedure not contained in these rules which may have been or may be made by the Supreme Court shall, where they conflict with these Rules, prevail and be deemed to govern the procedure in the matter therein mentioned.'

It appears that an application for extension of time prescribed by rules is a matter of 'procedure' within the meaning of that rule. An application for an order enlarging the time for the taking of a step was made in *In re The Plymouth Breweries Ltd.*, [1918] 1 K.B. 573, and Sankey, J., said in his judgment: 'I am of opinion that the question whether the time for appealing shall be extended is a matter of practice and procedure.' In *In re Oliver and Scott's Arbitration* (1890), 43 Ch. D. 310, the application was for an extension of the time prescribed for moving to set aside an award, that is to say, the same form of application as in the instant case. Kekewich, J., said, at p. 314:

'It seems to me that the time within which an application may be made is necessarily procedure. In truth, certainly a large majority of the applications which are made to the Court, and which, because of their dilatory character, are often advanced, and are called procedure summonses or procedure applications, relate to the time within which a certain thing has to be done. Therefore, that seems to me to be clearly procedure.'

Thus far, therefore, O. 47, r. 4 might be said to apply to a case in which the Arbitration Rules were concerned, since those rules are rules made by the Supreme Court. That brings us to the final question as to the applicability of O. 47, r. 4 to the instant case, namely whether there is a 'conflict' between the Arbitration Rules and the Civil Procedure Rules, for in that case the Arbitration Rules are to prevail and to 'govern the procedure' with the result that, according to the argument for the respondent, the period of eight weeks prescribed by r. 7 must be regarded as a fixed term within

which an application to set aside an award must necessarily be made. We do not, however, accept that view, for we do not think that there is any conflict between r. 7 of the Arbitration Rules on the one hand and on the other hand anything in the Civil Procedure Rules relating to the question of time in this particular instance. If the Civil Procedure Rules prescribed a period of time other than the period of eight weeks prescribed by r. 7 of the Arbitration Rules, there would, of course, be such a conflict. In our opinion there cannot be said to be a 'conflict' between a rule which prescribes a period for doing of an act and another rule which in general terms empowers the Court to extend the time allowed for the taking of various steps. The true view is that the second of such rules is complementary to the first."

Section 16 of The Trustees Incorporation Act confers almost unlimited powers on the Minister upon an application of "any interested party" to make orders regarding the constitution and conduct of any corporate body created under the Act or in regard to the trustees thereof and any such orders shall, subject to appeal, be "conclusive and binding for all purposes".

It is unfortunate the Court of Appeal has not given an obiter ruling on whether the effect of the said s. 97 as regards time prescribed by a statute is the same as regards time prescribed by a statutory rule as the issue was raised and referred to on p. 212 of the said judgment as follows:

"Mr. Khanna also prayed in aid s. 97 of the Civil Procedure Ordinance, which says 'the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court'. In our view there is no necessity to decide this point inasmuch as the other provisions of the Ordinance and of the rules made thereunder, to which we have already referred, suffice for present purposes. In particular, we need not decide whether the effect of this section as regards time prescribed by a statute is the same as its effect as regards time prescribed by a statutory rule."

For the purpose of this order I do not propose making an order of general application but only in relation to this particular Act and the rules made thereunder.

In the instant application it appears there are or were two rival factions in the African Greek Orthodox Church and one faction supported certain persons who purported to be duly and lawfully appointed trustees to make an application to the Minister for the said change of name, change of the device of the seal and the adoption of a new constitution. The opposing faction does not appear to have been notified of the application and were not given any opportunity of being heard prior to an order being made by the Minister. The Minister could not under these circumstances have exercised his discretion judicially and I must presume he was in fact unaware of any dispute between the two factions as to who were or should be the lawfully appointed trustees. If he had been aware of any such dispute he would no doubt have heard both sides and made an order in regard to the trustees but it is significant that he has not done so. As far as the Minister was concerned the only persons who could have been "aggrieved" would have been the applicants if the application had been refused in whole or in part.

The Act grants a right of appeal to "any person who deems himself aggrieved by any order made by the Minister" but also that he "may appeal to the High Court in accordance with rules of Court made in that behalf".

It appears to me inconceivable that the legislature intended that a person

who is in fact bitterly aggrieved by an order of the Minister made on an application of which he had no knowledge and of which he has not had any notice within thirty days of the making thereof is deprived of any right of appeal there-against on any grounds however meritorious such as fraud or deliberate misrepresentations to the Minister.

For these reasons I am satisfied I am invested with discretionary powers to extend the period for filing the appeal. From the affidavits it is obvious that there is bitter discord between the two factions and some of the applicants did not have notice of the order within thirty days of the making thereof.

Under these circumstances the time for filing the appeal is extended for seven days from today, the 15 December 1969, and on the appeal being filed the Registrar will act in accordance with r. 6.

The costs of this application will be paid by the applicants.

If the respondents have a right of appeal against this order subject to the leave of the Court, such leave is granted.

Application allowed.

For the applicants:

J. W. R. Kazzora (instructed by *Kazzora & Co.*, Kampala)

For the respondents:

V. N. Ponda (instructed by *Ponda Asaria and Co.*, Kampala)

Bakaboineki v Bunyoro District Administration
[1970] 1 EA 310 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	21 July 1969
Case Number:	123/1968 (134/69)
Before:	Phadke Ag J
Sourced by:	LawAfrica

[1] *Constitutional Law – Bunyoro District Administration – Liable as successor to Kingdom of Bunyoro-Kitara for negligence of officials of Kingdom – Local Administrations Act 1967 (U.).*

[2] *Damages – Assessment – Personal injuries – Paralysis of one side – Permanent disability of between 50% and 70% – Pecuniary loss of Shs. 150/- per month – Damages assessed at Shs. 75,000/-.*

[3] *Negligence – Contributory negligence – Invitee – Invitee wandering away from area of invitation – Darkness – Contributory negligence proved.*

[4] *Occupier's Liability – Invitation – Implied invitation – Munyoro attending official celebrations in*

Bunyoro for return of “lost counties” – Invitee.

[5] Occupier’s Liability – Invitee – Loss of status – Invitee becomes trespasser by wrongful and dangerous use of premises.

[6] Tort – Defences – Volenti non fit injuria – Not applicable unless plaintiff knew of danger.

Editor’s Summary

In December 1964 the Katikiro of the former Kingdom of Bunyoro-Kitara wrote a circular letter requesting all the people of the Kingdom to participate in celebrations to celebrate the return to the Kingdom of the “lost counties”. The plaintiff attended the celebrations, which went on after nightfall. In the night the plaintiff left the group with whom he had been dancing on open ground, and walked off to a dark spot near some trees, crossing as he did so a four-foot wide footpath. He fell into an open latrine pit and was injured. He brought this action against the defendant as successor to the Kingdom, claiming damages.

Held –

- (i) the circular letter was an implied invitation to the plaintiff and the plaintiff was an invitee when he entered the premises;
- (ii) but by leaving the open ground and crossing the footpath the plaintiff was making a wrongful dangerous and improper use of the premises; and he thus became a trespasser at the time he fell into the pit (*Hillen and Pettigrew v. I.L.I. (Alkali) Ltd.* (5) applied);
- (iii) on the pleadings however, the plaintiff must be treated as an invitee; and was therefore entitled to protection not only from dangers known to the invitor but also from those of which the invitor ought to have known (*Indermaur v. Dames* (1) applied);
- (iv) the maxim “volenti non fit injuria” did not apply;
- (v) the plaintiff was guilty of 90 per cent contributory negligence;
- (vi) damages should be assessed at Shs. 75,000/- of which the plaintiff should receive 10 per cent.

Judgment for the plaintiff for Shs. 7,500/- with interest and costs.

Cases referred to in judgment:

- (1) *Indermaur v. Dames* (1866), L.R. I C.P. 274.
- (2) *Letang v. Ottawa Electrical Company*, [1926] A.C. 725.
- (3) *The Calgarth*, [1927] P. 93.
- (4) *Addie (R.) and Sons Collieries v. Dumbreck*, [1929] A.C. 358.
- (5) *Hillen and Pettigrew v. I.C.I. (Alkali) Ltd.*, [1936] A.C. 65.
- (6) *Ellis v. Fulham Borough Council*, [1937] 3 All E.R. 454.
- (7) *Baker v. Bethnal Green Borough Council*, [1945] 1 All E.R. 135.
- (8) *Pearson v. Lambeth Borough Council*, [1950] 1 All E.R. 682.

Judgment

Phadke Ag J: The plaintiff’s cause of action in this suit goes back in point of time to December 1964 when there were in Uganda certain kingdoms which were later abolished by legislation and have now ceased to exist. One of such former kingdoms was the Kingdom of Bunyoro-Kitara. Upon the abolition of this kingdom, the defendant, which is a body corporate established under the Local Administrations Act 1967, succeeded to the rights and liabilities of the kingdom.

During the existence of the Kingdom of Bunyoro-Kitara, the Katikiro of the kingdom on 28 December 1964, published under his signature a circular letter written in the Lunyoro language and addressed to all the people of the kingdom. By this letter he requested the people of the kingdom to participate in the public celebrations organised by the kingdom on the occasion of the return to the kingdom of two counties – Buyaga and Bugangaizi – which had then come to be known in popular parlance as the “lost counties”. The celebrations were to take place on 31 December 1964 and 1 January 1965 at every Saza

and Gombolola Headquarters within the kingdom.

The circular letter included a programme of events which were arranged for both days but for the purposes of this suit only the programme for 31 December is relevant. The programme for that day, as shown in the English translation of the letter annexed to the plaint, was:

“31 December 1964.

At 9.00 p.m. to hold native dance or other dance at every Saza and Sub-counties (Gombolola) Headquarters.
There should be a strong camp fire up to 12 midnight.

At 12 midnight there will be flag raising of the Kingdom of Bunyoro at the gate of the Palace and at Saza Headquarters in conformity with what will be done in the counties of Buyaga and Bugangaizi. After flag raising, at 12.01 a.m. we request all the people to raise alarm and cry any words they will have for a period of 30 minutes. All the people in the Kingdom should signify their joy in any way and continue dancing.”

Celebrations were accordingly held at Bujenje Saza Headquarters on 31 December, and the plaintiff, who is a Munyoro, attended at these celebrations held on the open land occupied by the Saza Headquarters. Whilst the plaintiff was there, along with a crowd gathered for the same purpose, he fell into a ditch and sustained personal injuries.

The above-mentioned facts are not in dispute and have also been satisfactorily proved in evidence.

The plaintiff claims general damages from the defendant, as the successor to the liabilities of the kingdom, for the injuries sustained by him as the result of his fall into the ditch. He alleges that his fall was the consequence of negligence on the part of the defendant’s predecessor – the Kingdom of Bunyoro-Kitara. Particulars of the alleged negligence are stated in para. 5 of the plaint, as under:

- “(a) Failing to warn the plaintiff of the existence of such a dangerous hole.
- (b) Failing to cover the hole.
- (c) Failing to put any enclosure around the hole.
- (d) Failing to put any kind of warning near the hole.”

Particulars of the alleged injuries are also stated in para. 5 of the plaint, as under:

- “(a) Severe injury to right shoulder joint.
- (b) Severe injury to right elbow joint.
- (c) Severe injury to right hip joint.
- (d) Wasting of muscles and limitation of movement.”

The defendant in his written statement of defence pleads that the ditch in question was “sufficiently far away from the scene of the celebrations and consequently the plaintiff must have voluntarily assumed the risk in point”. I construe this as the defence of “volenti non fit injuria”, and indeed Mr. Matovu, Counsel for the defendant, described it as such in his submission. The defendant also pleads, in the alternative, that the plaintiff “contributed to the negligence by wandering about the place without any good reason”.

I am constrained to make some criticism of these pleadings. Although the plaintiff’s claim is based upon the fact that he was a visitor upon premises in the occupation of the defendant, there is no averment in the plaint describing what was his status, as cognisable in law, during his presence upon the premises. The defence also does not raise any issue about this matter. Neither Counsel addressed the court upon this aspect. Further, the defendant does not formally deny the items of negligence alleged by the plaintiff although at the trial evidence was adduced and a submission was made to the effect that the ditch was covered at the relevant time. I have made these criticisms not out of disrespect for counsel but to make one point clear at the outset. I cannot “make” the pleadings between the parties in the light of the evidence adduced but will give my decision on the pleadings as they are, although as will be seen from what I have later in this judgment to say my decision might well have been different from that which I have reached.

In view of the defences raised it becomes necessary to examine the evidence as to the situation of the ditch in question and the plaintiff's legal status whilst on the defendant's premises. Upon the plaintiff's legal status at the time will depend the nature of the duty owed to him for his physical safety.

Three sketch plans prepared by two witnesses were produced. One of them (exhibit 2) was drawn by the plaintiff's brother, Nabosi Kwiryari, a Grade III teacher, who had once received some training in surveying. This sketch plan was not drawn to scale and was not prepared until some time during the current year. The other two sketch plans (exhibits 3 and 4) were prepared by Nyakooja Asehol, a Forester who had received some training in surveying and drawing maps. Exhibit 3 is a rough sketch plan and is so cursorily drawn that it is not of any assistance. Exhibit 4 is, according to the witness, drawn to scale. Both were prepared some time during 1968. The quality of all the sketch plans leaves much to be desired, and in the case of exhibit 4 I consider that the scale mentioned at the top as being 1 inch for 250 feet is obviously an erroneous statement. Asehol, the drawer of exhibit 4, described the distance between the place of the bonfire and the ditch as 220 feet and this measurement is shown on the exhibit itself by means of a straight line measuring a little over 8 1/2 inches. This means that the scale must be 1 inch for 25 feet.

All the three sketch plans show that the open land is crossed by a road. Not far from this road and on its right is the office building of the Saza Headquarters with an open area at its front. Some distance away from the office building and parallel to it on the same side are shown the buildings of the Police Quarters and the Prison, one below the other, and below the Prison is shown a plantation of acacia trees. At the top edge of this plantation is shown the ditch, marked "Latrine pit". On the opposite side of the road and some distance away from it are shown two buildings used as Staff Quarters. Although these exhibits were drawn over four years after the accident they are helpful in indicating the general layout of the land, the buildings thereon and the situation of the ditch in question.

Exhibit 2 shows the distance between the open area of land in front of the office building and the ditch as 42 strides, which according to Nabosi Kwiryari, the fourth witness for the plaintiff, would measure 105 feet. On exhibit 4 this same distance, measured according to the scale of 1 inch for 25 feet (as explained above) would be about 125 feet. This difference of about 20 feet does not affect the matter greatly, one way or the other. On exhibit 2 is shown a footpath in front of the Police Quarters, the Prison and the plantation of acacia trees, and the evidence of Asehol was that this footpath was 4 feet wide.

In determining the legal status of the plaintiff I will examine the evidence and deal with the law applicable to the subject. The accident occurred on 31 December 1964. The plaint, although dated 23 November 1967, was not filed in court until 20 March 1968, and the suit was not brought on for trial until 4 June 1969. This delay has, I think, probably contributed to the unsatisfactory nature of much of the evidence.

The plaintiff stated in evidence that he reached the Saza Headquarters at 8.30 p.m. by which time the celebrations had already commenced. There were many people present but he was unable to say how many. Some were seated, some were dancing and some were moving about joyfully and shouting. It was a general gathering held upon the open land. The Saza Chief was seated and watched the celebrations. The plaintiff danced with a group of persons until about 11.15 p.m. when he felt the need for some fresh air, and so he walked away about 15 to 20 feet from his group. Then he fell into the ditch and was injured. People quickly noticed that he had fallen in but as they had to make ladders to bring him out he remained in the ditch for about an hour.

In cross-examination he stated that he does not drink any alcoholic drink and at the celebrations he did not eat anything or take any alcoholic drink. He walked away from the group not because he wished to ease himself but because he was sweating so much that he needed fresh air. It was a dark night and there was only one gas lamp, and there were many people around the lamp. The ditch was about 20 feet deep and was not covered. It was on open ground and was not surrounded by trees, but there was a mound of earth around it. He had been dancing at a spot about 15 to 20 feet from the ditch and he was certain that he had walked only that distance before he fell into the ditch.

Hoseya Kakoko (the second witness for the defendant), who was at the material time the Saza Chief at the Bujenje Saza Headquarters, stated that about 200 to 300 persons attended at the celebrations. People had brought their own drinks and there were persons selling beer. He heard that the plaintiff had fallen in a ditch – a latrine pit which was under construction. The pit was 4 feet long, 2 1/2 feet wide, and 15 feet deep. He was sure that logs of wood had been placed over it. Around the edges of the pit the ground was level and the earth dug out from it had been placed aside so that workmen could go on with the work. He could not remember if there was a gas lamp burning, but a bonfire had been lit from which there was sufficient light. The central spot of the gathering was around the bonfire.

In cross-examination he stated that he had expected a large crowd at the celebrations. The pit had been covered with logs of wood long before the celebrations and he had personally gone to the spot and seen that a sufficient number of logs had been placed over it. It was in early December that he had gone to the spot. The object of covering the pit was to protect people from danger, especially the prisoners who used to play near the place.

In answer to the court, the witness stated that on 31 December the digging had been completed and work was in progress for the construction of the building over the pit. For this purpose it was not necessary to remove the logs. He agreed that he did not inspect the spot on 31 December. He could not remember how many logs were placed over the pit but was certain that it was well covered. It was his opinion that the plaintiff's weight falling upon the logs had been the cause of the accident.

From the evidence described above, I am not satisfied that the ditch was covered on the night in question. The evidence of Kakoko was extremely vague, and I accept the plaintiff's evidence that the ditch was not covered as truthful. One thing, however, which clearly appeared from Hoseya's evidence was that he appreciated that the ditch if left uncovered constituted a danger. I am unable to accept his evidence that on 31 December logs of wood had been placed over the ditch. He did not go to the spot on that day and it may well be that the logs previously placed over it had been removed and not replaced by the workmen. In any case, even if I were to accept his evidence, I hold that such covering was not sufficient because if the plaintiff's weight had caused the logs to break it was useless as a protection from danger which was obvious and which was within his knowledge. I find that the plaintiff's allegation that the ditch was not covered was proved.

The principles of law applicable in determining the status of the plaintiff as cognisable in law are those of the English common law before the enactment of the Occupiers' Liability Act 1957, in that country. A person who is a visitor upon the premises of another comes under one of three categories known to the law, namely, "invitee", "licensee" and "trespasser". I refer to the following observations of Mackinnon, L.J., in *Ellis v. Fulham Borough Council*, [1937] 3 All E.R. 454, at page 463,

"As the result of a great number of cases there is no doubt whatsoever

that the great army of those who suffer physical injuries upon the premises of other people has to be divided into three regiments, as laid down by Lord Hailsham, L.C., in *Addie (R.) & Sons (Collieries) v. Dumbreck*, [1929] A.C. 358. Personally, I think that the names, or nicknames, that have been customarily applied to describe these three regiments are a little unfortunate. We all know what trespassers are and that one is clear; but the names of the other two, 'invitees' and 'licensees' are, I think, unfortunate if only for the reason that the most obvious use of the word 'invitation', in common language, is that connoting a request by a host to another person to attend a social function. A person who accepts that request and goes to his house, none the less ought to go into the regiment of licensees and not in that of invitees."

Commenting that the difference is difficult of definition, MacKinnon, L.J., referred to with approval the definition in *Salmond on Tort* (9th Edn.) at p. 514, that an invitee is a person who enters on the premises by the permission of the occupier granted in a matter in which the occupier himself has some pecuniary or material interest. The inviter says "I ask you to enter upon my business". The licenser says "I permit you to enter on your own business".

This definition was criticised by Asquith, L.J., in *Pearson v. Lambeth Borough Council*, [1950] 1 All E.R. 682. Asquith, L.J., observed that:

"Succinct and vivid as is this formula, it might suggest that the visitor is an invitee only if the business on which he comes is exclusively that of the occupier. This is, of course, not what is meant. It is more exact to say that an invitee is a person who comes on the occupier's premises with his consent on business in which the occupier and he have a common interest.

It is sometimes said that the interest must be pecuniary or at least 'material'. This certainly does not mean that a visitor who is not required to pay is necessarily excluded from the class of invitees."

Asquith, L.J., then referred to *Baker v. Bethnal Green Borough Council*, [1945] 1 All E.R. 135 in which certain obiter dicta of Lord Greene, M.R., appeared to carry the matter even a step further. In that case no pecuniary interest – immediate or long term – on the part of the occupier existed, but Lord Greene, without determining the point, made some observations to the effect that the visitor in that case probably came within the category of an invitee.

It will be seen from the references given above that the law requires something more than an express or implied invitation to enter upon premises to constitute an entrant an invitee. What that something more could be was the subject of judicial difference of opinion, but it came to be recognised that some "common interest" was required. In England the matter is now only of historical interest because of the Occupiers' Liability Act 1957, but in Uganda it is still the applicable law.

There are numerous English cases available for reference. In each case the decision turned upon the facts of that case to determine whether or not a common interest existed between the occupier and his visitor.

The first question is: was the circular letter an invitation to the plaintiff to attend at the celebrations? It does not contain any express invitation, but contains a request to all people to assemble at every Saza and Gombolola Headquarters and there engage in certain festive activities as directed. This I construe as an implied invitation to the plaintiff and I hold that the plaintiff was not a trespasser when he entered the premises of the Saza Headquarters.

The next question is did the plaintiff upon his entry as the result of the invitation

become an invitee or a licensee? If there was a common interest he was an invitee, otherwise a licensee. The plaintiff is a Munyoro and the celebrations on the occasion of an event joyful to the kingdom of which he was then a subject would be a matter of interest to him. The kingdom, by its authorised officers, would also have the same interest as the plaintiff, and indeed more so, in the presence of its subjects at the celebration. I hold that this community of interest between the parties was the common interest, although not pecuniary, required by the law. Therefore, I hold that at the time of his entry the plaintiff was an invitee and not a mere licensee.

However, it is to be noted that a visitor who at the time of his entry is an invitee does not necessarily retain that legal status throughout his presence on the premises. The law on this point is stated in *Salmond on Tort* (14th End.), p. 386, under the heading “Area of invitation”, as under:

“The duty owed to an invitee is limited to those places to which he might reasonably be expected to go, in the belief, reasonably entertained, that he was entitled or invited to do so, and to the use of those premises in the ordinary way. If the invitee goes outside the area of invitation he is a trespasser or at best a licensee. It is a question of fact, whether in all the circumstances of the case the invitor has taken reasonable steps to warn his invitee of the existence and scope of the prohibited area.”

In *Hillen and Pettigrew v. I.C.I. (Alkali) Ltd.*, [1936] A.C. 65, Lord Atkin states:

“... the duty to an invitee only extends so long and so far as the invitee is making what can reasonably be contemplated as an ordinary and reasonable use of the premises for the purposes for which he has been invited. He is not invited to use any part of the premises for purposes which he knows are wrongfully dangerous and constitute an improper use. As Scrutton, L.J., has pointedly said [in *The Calgarth*, [1927] P. 93 at p. 110] ‘When you invite a person into your house to use the staircase, you do not invite him to slide down the banisters.’ So far as he sets foot on so much of the premises as lie outside the invitation he is not an invitee but a trespasser, and his rights must be determined accordingly.”

In an earlier part of this judgment I have described the premises of the Saza Headquarters. The ditch in question was situate at almost the extreme edge of the open ground, and was adjacent to a cluster of acacia trees in front of which ran a footpath 4 feet wide. It was a dark night and there could not have been very much light from the bonfire and from the gas lamp if there was one. I am satisfied that the ditch was situate in a place which must have been very dark at the time. The plaintiff stated that he left his group and walked towards the cluster of acacia trees because he felt the need for fresh air. He denied that he went there to ease himself. I should have thought that if the plaintiff needed fresh air he would have done better to remain or move about on the open ground rather than go to a dark and desolate spot close to a cluster of trees. In my opinion the 4 feet wide footpath in front of the trees reasonably indicated the boundary of the area of invitation. Upon the facts, I have reached the conclusion that in leaving the open ground and crossing the footpath towards the cluster of trees standing in complete darkness the plaintiff was making a wrongfully dangerous and improper use of the premises. Applying the law as stated above to the facts as found by me, I hold that the plaintiff who originally entered the premises as an invitee became by his own acts a trespasser at the time of his fall into the ditch.

Such being my decision upon the legal status of the plaintiff I would have dismissed his claim but for the fact that the drawback in the defence as herein-beforementioned

precludes me from doing so. As observed by me earlier I cannot “make” the pleadings for the parties in the light of the evidence adduced. I am obliged to deal with the case as pleaded and not otherwise. Therefore, I will treat the plaintiff as falling within the category of an invitee and entitled to protection not only from dangers known to the invitor but also from those of which the invitor ought to have known. (*Indermaur v. Dames* (1866), L.R. 1 C.P. 274.)

I will now consider the defences as pleaded.

Upon the facts there is no merit in the defence of “volenti non fit injuria”. In *Letang v. Ottawa Electrical Company*, [1926] A.C. 725, it was stated that a defendant who desires to succeed on the ground that the maxim “volenti non fit injuria” is applicable must obtain a finding of fact that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it. Thus where it is found as a fact that a visitor voluntarily assumed the risk, the occupier cannot be said to have broken any duty of care towards the visitor. More knowledge of the existence of a wrongfully caused danger does not of itself amount to consent, and consent involves an express or implied agreement that the act may be rightfully done or the danger rightfully caused. I find as a fact that the plaintiff neither had knowledge of the existence of the ditch and the danger it constituted nor did he in any manner consent to incur the risk of such danger. I hold, therefore, that the defence of “volenti non fit injuria” fails.

The next defence is the alternative one of contributory negligence. This in itself is not a bar to a plaintiff’s claim but is only a ground for the reduction of damages. The particulars of the alleged contributory negligence, as given in the written statement of defence, are that the plaintiff wandered about the place without any good reason. I have already discussed the evidence at length. The question is can the plaintiff, in the circumstances, be said to have acted negligently and without care for his own safety in walking in the darkness towards the cluster of the acacia trees. Upon the facts I find that the plaintiff was guilty of very great contributory negligence and I apportion the blame as 90 per cent to him. He will be entitled to receive only 10 per cent of the amount of the damages which I will now proceed to assess.

Dr. Makoru, Dr. Bihomaiso and the plaintiff gave evidence regarding the injuries allegedly sustained by the plaintiff. After the two medical witnesses had given evidence, Mr. Sebalu, Counsel for the plaintiff, applied for leave to amend the particulars of the injuries by the addition of a further item alleging that as the result of the accident the plaintiff had become impotent. Mr. Matovu, Counsel for the defendant, opposed the application. I refused to give leave to amend. In any case, I would comment that the evidence as to the alleged impotency was most scanty and vague to say the least. [The judge set out the evidence and continued:] Even if I had permitted an amendment, I would have held that this item of alleged injury had not been proved with that degree of certainty which is required in such cases.

Dr. Makoru stated that he examined the plaintiff on admission in Masindi Hospital on 1 January 1965. The plaintiff was conscious and was able to speak. He had no wounds but his right leg and right arm were completely paralysed. He examined the plaintiff again on 9 November 1967. He had weakness of the right arm and right hip joint. There was wasting of the muscles of the shoulder and hip, with certain limitation of movement. There was nervous complication which had caused loss of control over these joints. The control of the voluntary muscles was lost. Apart from the injuries he is a well nourished man.

Dr. Bihemaiso, a general medical practitioner at Masindi, stated that he examined the plaintiff on 8 April 1969. The plaintiff has an abnormality in

the cranial nerves. In the limbs he has weakness of the right hand in the grip, and he cannot lift up his right leg. The muscles of the right palm are wasted and the fingers are held in flexion. There is difficulty in the movement of the lower and upper right leg. He walks with difficulty and cannot dress or undress. There is no response to abdominal reflexes. The knee and ankle jerks of both legs are exaggerated. The sensation to touch is diminished up to the level of the chest. In the opinion of the witness the plaintiff had suffered a compression of the spine resulting in paralysis, and he is incapable of doing any physical work. His permanent disability is between 50 per cent and 70 per cent.

The plaintiff stated that he has lost all sensation on the right side of his body. Before the accident he worked as a butcher and earned a net income of Shs. 750/- per month. He is now 37 years of age. He can hardly stand up and now has no occupation. In answer to the court, the plaintiff stated that he had carried on the business of a butcher since 1963 in partnership with two other persons. Each partner had invested a capital sum of Shs. 4,000/- and each used to make a profit of Shs. 750/- per month. After his accident the partnership was dissolved. There were no books of account. He had not saved any money from his earnings.

Having considered all this evidence and having observed the plaintiff's physical condition in court I am satisfied that he has suffered serious and severe injuries, and he will be unable to follow his occupation of a butcher. He has become a cripple. He must have suffered severe shock and pain and in the future he will continue to suffer from pain. He will have considerable discomfort and inconvenience and deprivation of the ordinary amenities of life. As regards the pecuniary loss of Shs. 750/- per month, I am not fully satisfied. There was no clear proof of his income and upon the facts and figures given by him I formed the impression that he was giving an exaggerated account. Even his Counsel felt that such evidence was exaggerated and suggested that a sum of Shs. 150/- per month would be a fair and reasonable estimate.

Giving the matter the best consideration I can, I have reached the conclusion that had I not held that the plaintiff was guilty of contributory negligence to the extent of 90 per cent I would have awarded him Shs. 75,000/- as general damages. Because of his contributory negligence, I award him 10 per cent of this sum, viz. Shs. 7,500/- with interest thereon at 6 per cent per annum from the date hereof to date of payment and I also award him the costs of this suit.

Judgment for the plaintiff.

For the plaintiff:

L. K. M. Sebalu (instructed by *Sebalu & Co.*, Kampala)

For the defendants:

M. B. Matoru (Senior State Attorney, Uganda)

Opiyo v Republic
[1970] 1 EA 319 (HCK)

Division: High Court of Kenya at Kisumu

Date of judgment: 28 August 1969

Case Number: 136/1969 (163/69)
Before: Bennett J
Sourced by: LawAfrica

[1] Criminal Practice and Procedure – Charge – Forgery – Not necessary to allege in charge an intent to defraud or deceive.

[2] Criminal Practice and Procedure – Charge – Uttering – Necessary to allege in charge that document was uttered knowingly and fraudulently.

[3] Criminal Law – Uttering a false document – Cheques placed in a safe – Whether uttering.

[4] Criminal Law – Theft – Either of cash or stamps – More likely that cash stolen – Evidence Act (Cap. 80), s. 119.

Editor's Summary

The accused was employed as a clerk by the Kisumu Municipal Council and was required to sell tax stamps and at the end of the day hand the cash and cheques to the cashier. He had authority to accept cheques as well as cash for the stamps. He kept the stamps, cash and cheques in the compartment of a safe belonging to the Council. The key of the safe was kept by the Principal Revenue Officer, but the accused kept the key of the compartment. There was a duplicate at the Bank.

When the accused was absent, the Town Treasurer taking the duplicate key checked the contents of the compartment in the safe. He found a stock of stamps, twelve cheques and cash which on being checked revealed a deficiency of Shs. 14,319/15.

The accused was charged on three counts of forging three cheques, on three counts of uttering them and on one count of stealing by a person in the public service.

The three cheques were from a cheque book issued to the accused by a bank. The accused's handwriting was on the body of the cheques but the signatures differed so much from the accused's specimen signature that the bank rejected them on subsequent presentation. The accused did not deny that he had signed the cheques. The amounts of the three cheques were far in excess of the accused's credit balance at the bank.

The accused was convicted on all counts, on the theft charge the magistrate finding that it was more likely that the accused had stolen cash and not stamps. In the absence of an explanation by the accused the magistrate applied the presumption of s. 119, Evidence Act. On appeal it was contended that there were no particulars of intent to defraud or deceive in the forgery counts, that there was no allegation in the uttering counts of uttering knowingly and fraudulently, that there was no evidence of uttering, and that theft of cash had not been proved.

Held –

- (i) it was sufficient to allege forgery which by definition includes intent;
- (ii) allegations of uttering knowingly and fraudulently should have been stated, but the omission had occasioned no failure of justice;

- (iii) the placing of the cheques in the compartment of the safe was a “using or dealing” with the cheques sufficient to constitute uttering;
- (iv) the finding that it was more likely that the accused had stolen cash would be upheld.

Appeal dismissed.

Cases referred to in judgment:

- (1) *R. v. McVitie*, [1960] 2 All E.R. 498; 44 Cr. App. R.201.
- (2) *Hassan Salum v. Republic*, [1964] E.A. 126.

[**Editorial note:** The statutory presumption under s. 119, Evidence Act, ought not to alter the burden of proof in criminal cases which is always on the prosecution unless expressly placed on the accused.]

Judgment

Bennett J: The appellant was convicted by the Resident Magistrate Kisumu, on three counts of forging three cheques, contrary to s. 350 (1) of the Penal Code; on three counts of uttering the same cheques, contrary to s. 353 of the Penal Code; and on one count of stealing by a person employed in the public service, contrary to s. 280 of the Penal Code. He was sentenced to four years' imprisonment on each count to run concurrently. He appeals against conviction and sentence on all seven counts.

The facts are fully set out in the careful judgment of the Resident Magistrate and all that is necessary to say about them is this: The appellant was employed as a clerk by the Kisumu Municipal Council. His duties were to sell GPT stamps and to hand over the proceeds of sale at the end of each day to the main cashier in the offices of the Council. It would appear that he was authorised to accept cheques as well as cash in payment for GPT stamps sold by him. He was given the exclusive use of a compartment in a safe belonging to the Council in which he kept GPT stamps, cash and cheques. The key of the safe was kept by the Principal Revenue Officer, but the appellant kept the key of the compartment. The only duplicate key of this compartment had been lodged with the bank.

On 2 April 1969, the appellant was absent from duty. On that day, Mr. Horsley, the Town Treasurer, in the presence of the Principal Revenue Officer, checked the contents of the appellant's compartment in the safe after having obtained the duplicate key from the bank. On checking the stock of stamps, cheques and the cash found in the safe, he discovered a general deficiency of Shs. 14,319/15. Included in the contents of the compartment were 12 cheques. There was evidence that the handwriting in the body of three cheques (which are the subject of the first six counts of the charge), was that of the appellant. There was also evidence that the cheques were on forms from a cheque book which had been issued to the appellant when he opened an account at Barclays Bank, D.C.O., Kisumu, on 28 February 1969. When these three cheques were presented for payment on 30 April, they were returned unpaid as the signatures differed from the specimen signature given by the appellant to the bank when opening his account. The signatures on the three cheques bear little, if any, resemblance to the appellant's specimen signature. There was no evidence that the signatures on the cheques resembled the signatures of any living person and in these circumstances it was, in my judgment, rightly inferred by the magistrate that the signatures on the cheques purported to be those of a fictitious person. The appellant did not deny that he had signed the cheques. The cheques are for Shs. 1,800/-, Shs. 4,729/- and Shs. 1,750/- respectively. They are all dated 1 April 1969. On that date, the credit balance in the appellant's account was Shs. 395/20. There was no evidence that he had overdraft facilities.

The convictions have been attacked by Mr. Omondi, who appeared for the appellant, on a number of grounds. First, it is contended that the first three

counts which charge the appellant with forgery did not disclose any offence because there was no allegation in the particulars of offence that the appellant forged the cheques with intent to defraud or to deceive. Reference was made to s. 345 of the P.C. which defines forgery as the making of a false document with intent to defraud or to deceive. It was argued that since neither of those intents was alleged to exist, the first three counts were bad and that the defect was not curable by s. 382 of the Criminal Procedure Code. It is conceded by Mr. Omondi that the three counts follow form 17 in the Second Schedule to the Criminal Procedure Code, but it is contended that the form itself does not comply with s. 134 to which it is subject. In my judgment, the word “forge” is to be regarded as a term of art and it connotes the making of a false document with intent to defraud or to deceive, having regard to the definition of forgery contained in s. 345 of the Penal Code. It was thus unnecessary to allege any intent in the particulars of offence. There was, of course, a burden on the prosecution to prove an intent to defraud or to deceive and the magistrate so directed himself in his judgment. The magistrate found that the appellant had forged the signatures on each of the three cheques in the name of a fictitious person with intent to defraud or deceive the Municipal Council and, in my judgment, there was ample evidence to support this finding.

The convictions on counts 4, 5 and 6, which charged the appellant with uttering the three cheques, have been attacked on two grounds. First, it is contended that the counts themselves were defective in that they did not allege that the appellant uttered the cheques knowingly and fraudulently. It is contended that having regard to s. 353 of the Penal Code, which makes it an offence to utter a false document knowingly and fraudulently, it cannot be said that the particulars disclose any offence. It is to be observed that the definition of the word “utter” in s. 4 of the Penal Code does not include any reference to guilty knowledge or intent to defraud. In my opinion, the particulars of offence should have alleged that the appellant uttered the cheques knowingly and fraudulently. While the particulars of offence in these three counts are defective, that is not to say that the charge is bad in law. A bad charge would be one disclosing no offence known to the law, for example, where it had been laid under a statute which had been repealed and not re-enacted. See *R. v. McVitie*, [1960] 2 All E.R. 498; 44 Cr. App. R.201.

The question for this court is whether the omission in the particulars of offence has in fact occasioned a miscarriage of justice. So far as the omission of the word “knowingly” is concerned since it was found as a fact that the appellant himself had forged all three cheques, he must have uttered them knowing that they were false. As regards the intent to defraud, the magistrate found that when the appellant forged the cheques he intended to defraud or deceive the Council. It seems to me to follow that he had the same intent when he uttered the cheques. The appellant was defended by Counsel at his trial and no objection was then made to counts 4, 5 and 6.

In all the circumstances, I am of opinion that the omission to state fully all the ingredients of the offence in the particulars has not occasioned any failure of justice and that this is a proper case in which to invoke s. 382 of the Criminal Procedure Code.

I now turn to Counsel’s submission that there was no evidence of uttering. What are the facts? The appellant placed the three cheques in a locked compartment of which he alone of the Council’s officers had a key. The compartment was in a safe belonging to the Council. The key to the safe was kept by the Chief Revenue Officer so that the appellant did not have free access to it but only by leave of the Revenue Officer. The appellant might at any time have been called upon to hand over the contents of the compartment and the key to another clerk as, apparently, happened in December 1968.

It is to be inferred from the evidence as a whole that the appellant intended that the three cheques which he had forged were to be regarded as a substitute for some of the missing cash. In these circumstances I am of the view that the placing of the three forged cheques in a compartment in the Council's safe was a "using or dealing with" the cheques and thus an "uttering" within the meaning of s. 4 of the Penal Code. It might have been otherwise had the appellant put the three cheques in his own private safe or in a drawer in his house.

With regards to count 8 on which the appellant was convicted of stealing Shs. 1,800/- the amount of one of the forged cheques – it is contended that the magistrate was wrong in inferring that the appellant had stolen cash. It is said that he overlooked the evidence of Mr. Horsley who testified that the shortage could have been cash or stamps or a combination of both. The magistrate gave reasons for his conclusion that it was more likely that the appellant had stolen cash rather than stamps. These reasons appear to me to be convincing. Under s. 119, Evidence Act, "The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case." In the light of the evidence and the failure of the appellant to give any explanation whatsoever of the shortage, I consider that the magistrate was entitled to presume that it was cash and not stamps which had been stolen by the appellant.

Lastly, the conviction on the forgery counts has been attacked on the grounds that there was insufficient evidence to prove that the handwriting on the cheques was that of the appellant. The writing in the body of the cheques was apparently in block letters and three witnesses including Mr. Horsley, who claimed to be familiar with the appellant's handwriting, identified it as that of the appellant. An attempt was made to shake the evidence of Mr. Horsley on this point by suggesting to him that in another case he had testified that he was not familiar with the appellant's handwriting. Mr. Horsley explained the discrepancy by saying that his answer in the other case related to a document which was in script and that what he meant was that he was not familiar with the appellant's script. He maintained, however, that he was familiar with the appellant's handwriting in block capitals. The writing in the body of the three cheques is in block capitals. So is the writing on four receipts which were said by Mr. Horsley and other witnesses to be in the handwriting of the appellant. Evidence was given by Mr. Thompson, a handwriting expert attached to the C.I.D., that in his opinion, the handwriting on these four receipts is the same as the handwriting on the body of the cheques. It is unfortunate that this witness did not give the reasons for his opinion as he should have done. In the circumstances the weight of his evidence was negligible: see *Hassan Salum v. Republic*, [1964] E.A. 126. However, I consider that quite apart from Mr. Thompson's evidence, there was sufficient evidence to prove that the handwriting in the body of the three cheques was that of the appellant. Moreover, the appellant never denied that the handwriting was his.

As regards the question of sentence, s. 350 (1) of the Penal Code, under which the appellant was convicted on the first three counts, provided for a maximum sentence of life imprisonment. There is no suggestion that the appellant has made good any of his defalcations or that he is likely to do so in the future. In the circumstances, I do not consider that there is any ground for interfering with the sentences.

Appeal dismissed.

For the appellant:

C. N. Omondi

For the respondent:
R. S. Sehmi (State Counsel)

Stumberg and another v Potgieter
[1970] 1 EA 323 (HCK)

Division: High Court of Kenya at Nairobi
Date of judgment: 20 November 1969
Case Number: 490/1969 (2/70)
Before: Kneller J
Sourced by: LawAfrica

[1] Civil Practice and Procedure – Consolidation of suits – Principles – When Court should order – Common questions of law or fact – Should not be ordered where claims and defences differ – Civil Procedure (Revised) Rules, 1948, O. 11 (K.).

Editor’s Summary

Consolidation of suits under O. 11 of the Civil Procedure (Revised) Rules 1948 should be ordered where there are common questions of law or fact in actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matters should be disposed of at the same time; consolidation should not be ordered where there are deep differences between the claims and defences in each action.

Application for consolidation dismissed.

Cases referred to in judgment:

- (1) *Payne v. British Time Recorder Co. Ltd. and Curtis Ltd.*, [1921] 2 K.B. 1.
- (2) *Horwood v. Statesman Publishing Co. Ltd.*, [1929] All E.R. Rep. 554.
- (3) *Jadva Karsan v. Harnam Singh Bhogal* (1953), 20 E.A.C.A. 74.
- (4) *Daws v. Daily Sketch and Sunday Graphic Ltd. and Another: Darke and others v. Same*, [1960] 1 All E.R. 397.

Judgment

Kneller J: By a Notice of Motion dated 4 March 1969, the advocate for the plaintiffs in this suit, and suit 1234 of 1968 with the same parties, moves the Court that

“the above suits be consolidated”

under O. 11 of the Civil Procedure (Revised) Rules 1948.

Order 11 reads thus:

“O. 11. Where two or more suits are pending in the same Court in which the
Consolidation of same or similar question of law or fact are involved the Court may either,
Suits upon the application of one of the parties, or of its own motion, at its
 discretion, and upon such terms as may seem fit

- (a) order a consolidation of such suits; and
- (b) direct that further proceedings in any of such suits be
 stayed until further order.”

The plaintiffs in each suit are business men of San Antonio, Texas in the United States of America and the defendant in each is a farmer at Timau.

The plaint in Civil Suit 490 of 1966 was filed on the 13 May 1966, and averred that:

- “3. The plaintiffs and the defendant are partners in a farming business

carried on in Timau, Kenya, and managed for the partnership by the defendant.

4. The defendant has during 1966 sold cattle and sheep the property of the partnership.
5. The defendant has failed to pay the proceeds of sales of partnership property to the partnership bank account, and has failed or refused to account to the plaintiffs' Nairobi agents.
6. The defendant has paid his own personal debts including his Income Tax out of partnership property.
7. The plaintiffs are entitled to immediate dissolution of the partnership, accounts, and judgment against the defendant for the amounts found due."

The prayer was for:

- "(a) an order dissolving the partnership between the plaintiffs and the defendant;
- (b) an order that the defendant do account to the plaintiffs;
- (c) judgment against the defendant for the sums found due on the account;
- (d) interest;
- (e) costs and interest on costs."

The suit farm, it was said, was originally owned by the defendant and then there was this partnership between them. The defendant managed the partnership farm and the plaintiffs were given the option, which they exercised, of buying a half share in the farm. The farm was, however, sold by the mortgagee under statutory powers of sale when the defendant failed to make a payment of £750.

An amended complaint was filed, without leave, on 11 June 1966. The new portion was:

- "4. The said partnership was from 20 October 1965, and was constituted by an option agreement between the parties dated 19 September 1964, and by the exercise of the option by a letter dated 26 October 1965, from the plaintiff's advocates to the defendant."

This posed as the main issue whether or not a partnership existed. On 8 July 1966, the plaintiffs appealed to the Court under O. 6, r. 18 for leave to re-amend the amended complaint. They wanted to add:

- "9. In the alternative by the aforesaid documents the plaintiffs became joint owners in equal shares with the defendant in the land livestock and moveables as set out in the said option agreement of 19 September 1964.
10. The defendant has sold jointly owned property and has failed to pay to the plaintiffs half of the sale price received."

Leave was granted by Chanan Singh, J., on 14 July 1966, and the alternative claim of joint ownership was added to the allegation of a partnership.

On 17 October 1966, the defendant filed his defence to the re-amended complaint. The defendant denied that any partnership in the farming business existed between the plaintiffs and himself. He claimed he was sole owner of it and at all material times the registered proprietor of the land as lessee from the Government of Kenya and sole owner of all the improvements, live and dead stock on it. He denied the option was binding in law or in fact and claimed it was void for uncertainty and unenforceable. He also denied that any form of joint ownership existed. He then set up, in the alternative, a later partnership and

called for an order for an account to be taken and for the defendant to be indemnified by way of contribution by the plaintiffs.

On 16 May 1967, the plaintiffs applied under O. 6, r. 18 for leave to amend their re-amended plaint by adding a claim for an indemnity on a guarantee. It was said that it only arose because the defence denied the option had any legal effect and that the partnership or joint ownership had never come into operation. This was dismissed by Madan, J., on 12 July 1967, because there was no appearance for the plaintiffs.

Nothing happened then until 24 September 1967, when the plaintiffs filed a plaint which opened Civil Suit 1234 of 1968. The plaintiffs claimed Shs. 168,463/20 from the defendant on an agreement, express or implied, by him to indemnify the plaintiffs under a guarantee by an irrevocable letter of credit No. 117 dated 30 November 1964, issued by the Broadway National Bank of Alamo Heights, San Antonio, Texas on the instructions of the plaintiffs or, alternatively, as money paid by the plaintiffs at the request of and for and to the use of the defendant.

The defence to this was filed on 23 November 1968, and denied the agreement express or implied.

On 31 July 1969, the plaintiffs applied again to have leave to amend their re-amended plaint. They applied under O. 6, r. 18. This time, so that the Court could determine the real question in controversy in these suits the plaintiffs wanted to add to the re-amended plaint these new paragraphs:

- “5. Pursuant to and in consideration of the option agreement aforesaid the plaintiffs paid or caused to be paid to the defendant the sum of Shs. 160,000/00 which said sum was duly received by the defendant.
6. If, which is denied, this Honourable Court holds that the option agreement aforesaid is void and unenforceable in law for any reason whatsoever the plaintiffs will submit:
 - (i) That the consideration, namely, the said sum of Shs. 160,000/00, for which they entered into the agreement aforesaid has totally failed. By reason whereof the plaintiffs are entitled to the return of the said Shs. 160,000/00 as money received by the defendant to the use of the plaintiffs.
 - (ii) That they paid or caused to be paid to the defendant the said Shs. 160,000/00 under a mistake of fact or of mixed fact and law that the said option agreement was binding and enforceable. The said Shs. 160,000/00 was duly had and received by the defendant and he has derived an unjust benefit therefrom. The defendant is liable to repay the said sum to the plaintiffs; and/or
 - (iii) That it was a term necessarily implied by law of the said option agreement that in the event of the said agreement not being binding and enforceable in law, plaintiffs would be entitled to a refund of the said Shs. 160,000/00 from the defendant.”

The defendant filed an affidavit on 1 September 1969, resisting this because he believed the new case was among other things inconsistent, embarrassing and not pleaded; in the alternative, the payment was never made to him, if it were, the date of payment was not disclosed, if it were paid after 13 May 1966 which was the date of the original plaint it was incompetent to introduce it by amendment, it ought to be the subject of another suit, the plaintiffs were guilty of delay and it was all an abuse of the process of the Court.

The plaintiffs then moved the Court for these suits to be consolidated. The application was dated 4 March 1969.

The defendant put in a Notice of Preliminary Objection on 30 September 1969, stating:

“The application for consolidation is premature, and should be dismissed with costs, certified for two counsel and payable forthwith, because the pleadings in this Suit have not been finalised, and are still the subject of a pending application to amend the re-amended plaint.”

On 1 October 1969, this Court allowed the plaintiffs’ application dated 31 July 1969, under O. 6, r. 18 for leave to amend their re-amended plaint to be withdrawn. The defendant did not resist the application but asked for costs of the application: he is entitled to that including the costs of his replying affidavit dated 28 August 1969. He also asked for a certificate for two counsel. I have studied the application, its history, considered its importance to the defendant’s suit and the necessary instructions and drawing of documents for it. The matter was handled by one counsel for the two plaintiffs and could, in my opinion, have been handled by one counsel on behalf of the defence. I, therefore, refuse, in my discretion, the certificate asked for.

The Notice of Preliminary Objection was competent as I have already held on 1 October this year. The costs of the Notice of Preliminary Objection in each suit will be awarded to the defendant.

On the same day the parties then turned to the application to consolidate these suits. Here are the arguments for and against consolidation which they advanced.

The plaintiffs pointed out the two suits were pending in the same court, the question of law and fact were similar, the parties were the same, they were represented by the same advocates, the basis of each suit was the validity or otherwise of an option agreement. This, said the advocate for the plaintiffs, picturesquely, was the silver thread that ran through each suit. There was one more substantial issue common to each suit. Did the plaintiffs pay this sum or any sum to acquire a half interest or any interest in the livestock and machinery on the farm?

The defendant urged that consolidation was unwarranted. The fact that the two suits involved the same parties and same advocates were not mentioned in O. 11 and was a consideration of no consequence. The crucial question was whether or not the answer to the issue in one suit were an answer to the second. The option agreement was only an admitted introductory fact and not an issue which required to be investigated. The plaintiffs’ claim that they could win on one claim only was an argument against their allegation that the facts were common. There was nothing in common between the suits broadly speaking, minutely considered or proportionately, concluded the defendant’s advocate.

A broad principle has emerged from English decisions relating to consolidation applications. It is this. Where there are common questions of law or fact in actions having sufficient important in proportion to the rest of each action to render it desirable that the whole of the matters should be disposed of at the same time, consolidation should be ordered. *Daws v. Daily Sketch and Sunday Graphic Ltd. and Another*; *Darke and Others v. Same*, [1960] 1 All E.R. 397; *Payne v. British Time Recorder Co. Ltd. & Curtis Ltd.*, [1921] 2 K.B. 1 at p. 16, and *Horwood v. Statesman Publishing Co. Ltd.*, [1929] All E.R. Rep. 554. And this broad principle I propose to follow, with respect, when I come to exercise my discretion in this suit.

It seems to me when I look at the issues raised in these two present cases I cannot find here

“... a common question of law or fact bearing sufficient importance in

proportion to the rest of the action to render it desirable that the whole of the matters should be disposed of at the time . . .”

There are deep differences in the claims and the defences in each action.

There may have been one transaction but different causes of action have arisen out of it. They need not be included in one suit: Sir Newnham Worley, V.-P., obiter, in *Jadva Karsan v. Harnam Singh Bhogal*, [1953] 20 E.A.C.A. 74, at p. 76 (C.A.).

The only common issues of law or fact are that the defendant had a farm, a mortgaged one, on which he defaulted and the plaintiffs advanced money to him.

The application fails. It did not ask for the two actions to be set down consecutively before one judge and that suggestion by the advocate for the plaintiffs at this stage seems to be unacceptable to the defendant. I express no opinion on the merits of that proposal and make no order on it.

Costs of the plaintiffs’ withdrawal of their application dated 31 July 1969, to amend their re-amended plaint to the defendant including the costs of the defendant’s replying affidavit dated 28 August 1969;

Certificate for two counsel for the defendant on the said application refused;

Costs of the defendant’s Notice of Preliminary Objection dated 30 September 1969 in each suit to the defendant;

Plaintiffs’ applications to consolidate the two actions dismissed with costs in each suit to the defendant.

For the plaintiffs/applicants:

R. N. Sampson (instructed by *Archer and Wilcock*, Nairobi)

For the defendants:

D. N. Khanna and *T. R. Johar* (instructed by *Johar & Co.*, Nairobi)

Commissioner-General of Income Tax v P Ltd [1970] 1 EA 328 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	22 January 1970
Case Number:	15/1969 (26/70)
Before:	Sir Charles Newbold P, Duffus VP and Spry JA
Sourced by:	LawAfrica
Appeal from:	The High Court of Kenya – Trevelyan, J.

[1] *Income Tax – Deduction – Investment Allowance – Building – Whether confined to industrial building – East African Income Tax (Management) Act 1958, Schedule 2, para. 27 (e).*

[2] Income Tax – Deduction – Investment Allowance – Manufacture of goods – Whether printing the manufacture of goods – East African Income Tax (Management) Act 1958, Schedule 2, para. 27 (e).

[3] Income Tax – Deduction – Investment Allowance – Expenditure not incurred substantially for replacement of existing machinery – Meaning – East African Income Tax (Management) Act 1958, Schedule 2, para. 27 (e).

Editor's Summary

The High Court allowed an appeal by the respondent and held that it was entitled to an investment allowance in respect of the purchase and installation of certain printing machines ([1969] E.A. 531). The Commissioner-General appealed, contending that an investment deduction is only allowable when the machinery is installed in a building which becomes an industrial building subsequent to the installation, and that the activities of the respondent were not the manufacturing of goods. The respondent cross-appealed, challenging the disallowance of a deduction in respect of one machine.

Held –

- (i) building in para. 27 (e) Second Schedule is not confined to a non-industrial building;
- (ii) the respondent's trade consisted of the manufacture of goods;
- (iii) (by Sir Charles Newbold, P. and Duffus, V.-P.; Spry, J.A., dissenting) the words "expenditure has not been incurred substantially for the replacement" means that "irrespective of the object of the expenditure the machinery purchased must not in fact have replaced existing machinery."

(By Spry, J.A.) "incurred for the replacement of" means "incurred in order to replace" and therefore what matters is the intention of the taxpayer at the time the expenditure is incurred.

Appeal and cross-appeal dismissed.

No cases referred to in judgment.

The following considered judgments were read:

Judgment

Sir Charles Newbold P: This is an appeal by the Commissioner-General of Income Tax against a decision of the High Court upholding a claim by a taxpayer company to an investment deduction in respect of the cost of certain machines and a cross-appeal by the taxpayer against the refusal of the judge to allow a similar deduction in respect of a new "Roland" printing machine.

Very briefly, the facts are that in 1963 the taxpayer commenced business as a commercial printer and in 1964 and 1965 expanded its activities to include the production of packaging articles, such as cigarette cartons and shoe boxes. After 16 June 1964, the taxpayer incurred capital expenditure on the purchase and installation in the building it had previously used for its printing activities of certain machines, which machines included a new “Roland” printing machine and a reconditioned “Roland”. The taxpayer claimed an investment deduction in respect of the capital expenditure incurred on all of these machines under para. 27 of the Second Schedule to the East African Income Tax (Management) Act. That paragraph reads as follows:

“27. Subject to this Schedule, where:

.....

- (e) the owner or lessee of a building incurs after 16 June 1964, capital expenditure . . . on the purchase and installation of machinery in such building which building and machinery is subsequently used for the purposes of a trade which consists in the manufacture of goods or materials . . . and such expenditure has not been incurred substantially for the replacement of machinery previously in use in an existing trade carried on by such owner or lessee,

there shall be deducted in computing his gains or profits for the year of income in which the ship or building or extension or machinery is first so used, a deduction (referred to as an “investment deduction”) equal –

.....

- (iii) in the case of capital expenditure to which paragraphs (c), (d) or (e) applies, to twenty per cent of such expenditure.”

The judge held that the taxpayer was entitled to an investment deduction in respect of the cost of certain of these machines, but was not entitled to such a deduction in respect of the cost of the new “Roland” machine and a reconditioned “Roland” machine as these two machines were in replacement of machinery previously in use. The Commissioner-General has appealed against the decision in so far as it allows any investment deduction and the taxpayer has cross-appealed in so far as it rejects the investment deduction in respect of the cost of the new “Roland” machine.

Mr. Muli, on behalf of the Commissioner-General, has urged that the taxpayer is not entitled to any investment deduction on two main grounds.

The first is that as the building in which the machines were installed had, prior to such installation, been used by the taxpayer for its business, it was an industrial building prior to such installation and that sub-para. (e) only permitted of an investment deduction when the machinery is installed in a building which only became an industrial building subsequent to such installation. I do not agree. The word used throughout sub-para. (e) is building and this word is in contrast to the words “industrial building” used in sub-para. (b) and (c) of the same paragraph. There is absolutely no reason to restrict the word building to a non-industrial building. As the broad object of sub-para. (e) is to encourage certain forms of production it is requisite that the building and machinery should be “subsequently used for the purposes of a trade” but equally there is no reason to read into that passage after the word “subsequently” the restrictive words “and for the first time”.

The second is that the activities carried on by the taxpayer do not consist of “the manufacture of goods” as required by sub-para. (e). Again I do not agree.

The verb “to manufacture” may, within certain limits, have different meanings according to the context in which it is used, but in almost every sense it must mean to produce something by some form of activity. It may be a question of degree in certain cases whether an activity has produced a thing as opposed to merely embellishing an existing thing, but in this case I find absolutely no difficulty in coming to the conclusion that the taxpayer manufactured goods. To take, as an example, one of its products, cigarette cartons, which are undoubtedly goods, no one in his senses would say that these goods were not produced by the taxpayer as a result of its activities. It is true that the materials from which the cartons were made, such as the paper and the ink, were not raw materials in the normal sense of those words and had themselves previously been manufactured, probably by someone else. But when these materials entered the taxpayer’s premises they were paper and ink; when they left no one would have described them as anything other than cigarette cartons, though in one sense they may still have been paper and ink. The taxpayer had produced, by its activities, cigarette cartons out of, inter alia, paper and ink, and it had done this in the building and with the machinery in respect of which the deduction is claimed. Consequently, I am quite satisfied that the taxpayer in such building and by means of such machinery carried on a trade which consisted of the manufacture of goods.

Finally there was a submission, for the first time on appeal, that as the majority of the expenditure on the machines related to the two machines in respect of which the judge did not allow the deduction since he considered them replacements for existing machines therefore the expenditure as a whole was substantially for replacement and no part of such expenditure would qualify for a reduction. This submission is based on a misconception of the grammatical relationship of the word “substantially”. That word relates to the utilisation of the machinery in respect of which the expenditure was incurred and is in no way related to the quantum of such expenditure.

For these reasons I am quite satisfied that the appeal fails. I turn now to the cross-appeal which has given me considerable difficulty.

The issue is whether the expenditure on the new “Roland” machine “has not been incurred substantially for the replacement of machinery previously in use in an existing trade carried on” by the taxpayer. It is necessary first to determine as a question of law what those words mean and then to determine whether on the facts the new “Roland” machine substantially replaces any existing machine within the true meaning to be ascribed to those words. It is, I think, clear that no piece of machinery can be said to replace another unless that other ceases to operate in the capacity in which it was operated, though such cessation need not be contemporaneous with the installation of the new machinery so long as it takes place within a period which is reasonable in the circumstances. It is also, I think, clear that merely because the new machinery can perform additional work or produce its end-product faster does not mean that it is not a replacement for more limited or slower machinery.

The words “expenditure has not been incurred substantially for the replacement” are capable of three interpretations. First, that in order to qualify for a deduction the expenditure must not have been incurred with the object of purchasing machinery to replace existing machinery, whether or not that replacement in fact eventuated. Secondly, that the expenditure must not have been incurred with that object and the machinery must not in fact have replaced existing machinery. Thirdly, that irrespective of the object of the expenditure the machinery purchased must not in fact have replaced existing machinery. I think that as the broad object of paragraph 27 is to encourage development and expansion as opposed to mere replacement the last of those three possible

interpretations is the correct one. This being so, the question is whether on the facts the new “Roland” machine, irrespective of the object for which it was purchased, in fact substantially replaced existing machinery.

A tentative order for the new “Roland” machine was placed late in 1963; the firm order was placed in October 1964; it arrived in March 1965, and installation was completed in July 1965. The reconditioned “Roland” machine was ordered in May 1965; it arrived in November 1965; and installation was completed in December 1965. Prior to the installation of these two printing machines the taxpayer had, in addition to other machines, two “Mann” printing machines which did the same type of work done by the “Rolands” though the “Mann” machines were slower and, prior to a conversion which took place after the taxpayer had parted with the “Manns”, more limited in type of output. After the installation of the “Rolands”, one “Mann” was dismantled in February 1966, the other in May 1966, and they were both sent to Uganda in August 1966. The taxpayer, for political reasons, first considered the formation of a Uganda company to take over the Uganda part of its activities at the end of 1964; the decision to form a Uganda company was taken in March 1965; and it was incorporated in January 1966. It was to this company that the two “Mann” machines were sent. Similar action was taken in relation to the formation of a Tanganyika company.

It was held by the judge and accepted by the taxpayer that the reconditioned “Roland” was substantially in replacement of one of the “Mann” machines; but it was submitted that the decision of the judge that the new “Roland” was also substantially in replacement of the other “Mann” machine was erroneous on two main grounds. First, that the decision to purchase the new “Roland” was made before the decision to form a Uganda company and, secondly, that the new “Roland” was working side by side with both “Mann” machines for seven to eight months before the first of these machines was dismantled. As regards the first ground, I have already held that the object with which the expenditure is concerned is immaterial, though I would accept that in a case of doubt it might well be a relevant factor for consideration in order to arrive at a conclusion as to whether, in fact, there had been substantial replacement. Consequently it is immaterial whether or not the decision to order the new “Roland” was taken before the decision to form a Uganda company.

As regards the second ground, it would seem that the new “Roland” continued to work alongside the machine it replaced for as long as seven to eight months. The judge considered this undoubtedly lengthy period and came to the conclusion that this was because there was no point in dismantling the “Mann” machines until the Uganda company was incorporated and was in a position to commence operations. Part of this lengthy period was probably also taken up in training staff for the Uganda operation. While I have no doubt that the new “Roland” machine increased the output and quality of the work previously done by the “Mann” machine, nevertheless it would seem that as far as the taxpayer was concerned it substantially replaced the “Mann” machine which was no longer operated by the taxpayer and that it did so within a period which, though unusually long, was possibly reasonable in the circumstances. The case is a border-line one and the onus is on the taxpayer to prove that the expenditure was not incurred substantially for replacement. The judge has held that it has not done so and while I have wavered in my view during the course of the argument and on consideration afterwards, I have come ultimately to the conclusion that I cannot say that the judge was wrong and that the taxpayer has discharged the onus on it. I would thus dismiss the cross-appeal.

For these reasons I would dismiss the appeal with costs and as the other members of the Court agree it is so ordered. I would also dismiss the cross-appeal with costs and as Duffus, V.-P., agrees, it is so

ordered.

Duffus VP: The facts have been fully stated by My Lord President. I entirely agree with his judgment on the appeal.

The cross-appeal depends on the interpretation of para. 27 (e) of the Second Schedule of the East African Income Tax (Management) Act 1958 which provides for an allowance to be, in certain circumstances, made for expenditure incurred in the purchase and installation of machinery. The following circumstances apply:

- (1) the allowance is in respect of capital expenditure incurred both for the purchase and for the installation of machinery in a building, and
- (2) both the building and the machinery must be subsequently used for the purpose of a trade which consists in the manufacture of goods or materials, or the subjection of goods or materials of local origin to any process, and further that
- (3) that the expenditure has not been incurred substantially for the replacement of machinery previously in use in an existing trade carried on by such owner or lessee, and
- (4) the expenditure is incurred after 16 June 1964.

If all these conditions are fulfilled then the deduction is allowed for the year of income in which the machinery is first so used.

The difficult question here is the interpretation of the words “has not been incurred substantially for the replacement of”. In this case the expenditure consists both of the cost of the new machinery and of its installation. The incurring of the expenditure is, therefore, not complete until the machinery is installed and ready for use. There is also the further circumstance that the allowance cannot be claimed until the year of income in which the machine is first used: it is possible that a machine is purchased and installed but not used and in such a case the allowance cannot be claimed until the year of income in which it is first used.

It appears to me that the taxpayer must establish, when he claims the allowance for the expenditure, that the machinery was purchased, installed and used in the circumstances set out and further show that the machinery was not at the time when it was installed and first used substantially for replacement of machinery previously in use. The relevant time is when the machinery is first so used, and it has to be decided whether, as at that time, the expenditure of purchasing and installing the machinery “has not been incurred substantially for the replacement of machinery previously in use”. In deciding this question all the relevant factors have to be taken into account, and they include evidence as to what occurred both before and after the machine was first used and, of course, the most material factor is whether or not the machine was in fact a replacement or an additional machine, and the onus is on the taxpayer to establish his claim.

I find this a difficult question to determine on the facts of this case. The machinery in fact eventually turned out to be a replacement of a machine already in use; but this was only after a period of the joint user of both machines for some seven to eight months. In all the circumstances of the case, there was, however, in my view, sufficient material to justify the finding of the trial judge that the new machine was in fact obtained as a replacement of the previous machine, or that in any event that the appellant company had not proved that it was not a replacement.

In my view the cross-appeal should also be dismissed.

I agree, therefore, with the judgment and order of My Lord President.

Spry JA: I have had the advantage of reading in draft the judgment of Sir Charles Newbold, P., and, save on one question, I respectfully agree with it. I have no hesitation in agreeing that the appeal must be dismissed.

The question on which I venture to differ is the interpretation of the words “such expenditure has not been incurred substantially for the replacement of machinery previously in use” in para. 27 of the Second Schedule to the East African Income Tax (Management) Act 1958.

In my opinion, the word “for” in its ordinary sense in a context such as this is indicative of purpose and the words “incurred . . . for the replacement of” means incurred in order to replace. I think, therefore, that what matters is the intention of the taxpayer at the time when the expenditure is incurred. I do not think the eventual use is relevant except so far as it provides evidence (and it may afford the very strongest evidence) of the earlier intent. The paragraph relates the question of replacement to the incurring of the expenditure, not to the use of the machinery. If the legislature had intended to say “and which is not used substantially in replacement of machinery previously in use”, it could easily have done so.

I think this interpretation is consistent with the obvious intention of the legislature to encourage the development of manufacture. I think it is at the moment when a manufacturer is hesitating whether to incur expenditure on additional machinery, that the existence of a tax relief such as this may encourage a spirit of enterprise.

Applying this interpretation, however, I do not find it easy to decide whether or not the new “Roland” was intended substantially as a replacement, because the evidence is not very clear. This is largely because the only witness referred during most of his evidence to two machines, the new “Roland” and the reconditioned “Roland”, collectively, although they were acquired at different times and in different circumstances.

The paragraph refers to expenditure on the purchase and installation of machinery but in the present case no claim has been made for capital expenditure on installation and it may well be that there was none. I think that the evidence does show that when the new “Roland” was bought, the taxpayer’s business was expanding. I accept that, on the evidence, the new “Roland” was ordered a substantial time before the decision was taken to set up a subsidiary or associated company in Uganda and probably before that move was even seriously contemplated. I accept also that the new “Roland” was intended to increase the taxpayer’s manufacturing capacity, although that fact would not avail the taxpayer if increased capacity were merely to come from the greater efficiency of the new machine. The witness did, however, say in re-examination, when for the first time he dealt separately with the new “Roland”, that there was never any idea of leaving the “Manns” out of commission because the “Rolands” could do the work quicker and he said positively that the new “Roland” was acquired as an addition and not as a replacement.

That evidence must, I think, be examined in the light of what happened. The old “Manns” were sold about nine months after the installation of the new “Roland”. At first sight, this would seem to raise an inference that the purchase of the new “Roland” was by way of replacement. The sale was, however, to an associate company newly formed to do in Uganda work which had formerly been done in Nairobi for Uganda customers and it appears that, between the time of the installation of the new “Roland” and the time when the Uganda business was transferred to the new company, all the taxpayer’s machines were fully occupied.

On these facts, I think the taxpayer has discharged the onus of proving that

the expenditure on the new “Roland” was not incurred for the replacement of machinery previously in use and I would have allowed the cross-appeal.

Appeal and cross-appeal dismissed.

For the appellant:

M. G. Muli (Deputy Counsel to the Community) and *T. T. M. Aswani* (Assistant Legal Secretary)

For the respondent:

J. A. Mackie-Robertson, Q.C. and *P. J. Hewitt* (instructed by *Daly and Figgis*, Nairobi)

East African Railways and Harbours v Nairobi City Council [1970] 1 EA 334 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	27 January 1970
Case Number:	1/1969 (27/70)
Before:	Sir Charles Newbold P, Duffus VP and Spry JA
Sourced by:	LawAfrica
Appeal from:	The High Court of Kenya – Farrell, J.

[1] *Rating Law – Revaluation – Cause particular to land – Decision of Court of Appeal – Valuation for Rating Act (Cap. 266), s. 4 (1) (K.).*

[2] *Appeal – Jurisdiction – Appeal from court to which appeal lies by statute – Appeal lies to Court of Appeal – Valuation for Rating Act (Cap. 266), s. 20; Civil Procedure Act (Cap. 5), s. 66 (K.).*

[3] *Civil Practice and Procedure – Whether decision a decree or order – Decision of High Court on a case stated – Valuation for Rating Act (Cap. 266), s. 20.*

Editor’s Summary

A Valuation Committee appointed under the Valuation for Rating (Public Land) Rules 1967 referred a question of law to the High Court in the form of a special case under s. 20 (1) of the Valuation for Rating Act. The appellant filed an appeal from the High Court decision. The case stated arose out of an application by the appellant under the Valuation for Rating Act, s. 4 (1) (d) for the revaluation of railway property in Nairobi. The ground for the application was that the value of the property had been increased by the decision of the Court of Appeal in *General Manager E.A.R. & H. v. Arusha Town Council* (6).

Held –

- (i) an appeal lies to the Court of Appeal from a decision of the High Court under the Valuation for

Rating Act, s. 20 (1) (*Sheikh Brothers Limited* (2) and *Cowasjee Dinshaw & Brothers (Aden) Ltd. v. Cowasjee's Staff Association* (5) followed);

- (ii) a case stated to the High Court under the Valuation for Rating Act, s. 20 (1) is not commenced in manner prescribed by the Civil Procedure (Revised) Rules 1948 and accordingly the adjudication thereon is an order;

(obiter) (by Duffus, V.-P.) the *Arusha* case, if it applies in Kenya, does not alter the law but only explains and determines how the existing law should be interpreted;

(obiter) (by Spry, J.A.) the *Arusha* decision could not be said to be particular to land in Nairobi.

Appeal struck out.

Cases referred to in judgment:

(1) *National Telephone Company v. Post-Master General*, [1913] A.C. 546.

(2) *Sheikh Noordin Gulmohamed v. Sheikh Bros. Ltd.* (1951), 18 E.A.C.A. 42.

- (3) *Mansion House Ltd. v. Wilkinson* (1954), 21 E.A.C.A. 98.
- (4) *Commissioner of Lands v. Concrete Works Ltd.*, [1958] E.A. 254.
- (5) *Cowasjee Dinshaw & Brothers (Aden) Ltd. v. Cowasjee's Staff Association*, [1961] E.A. 436.
- (6) *General Manager E.A.R. & H. v. Arusha Town Council*, [1966] E.A. 358.

The following considered judgments were read:

Judgment

Duffus VP: This is an appeal from the decision of a judge of the High Court on a question of law referred to him by a Valuation Committee appointed under the Valuation for Rating (Public Land) Rules 1967. The reference was made in the form of special case by virtue of s. 20 (1) of the Valuation for Rating Act (Cap. 266) which states:

“If, during the consideration of an objection by a valuation court, any question of law arises as to the principle upon which any valuation has been or should be made, it shall be lawful for such court, instead of itself deciding such question, at the request of any party to the hearing, to reserve such question of law for decision by the High Court, and such question shall be stated in the form of a special case.”

Under r. 2 (3) of the Rules, the reference to a valuation court is to be read as a reference to a valuation committee.

This case arose from an application by the General Manager of the E.A.R. & H. Administration for an amended valuation of railway property in Nairobi for the purpose of the Valuation for Rating Act to be included in a supplementary roll. The matter came before the Nairobi City Valuation Committee and it was at the request of both parties that the Valuation Committee submitted questions of law for the decision of the High Court by virtue of s. 20 of the Act. It is agreed by the parties that the reference was properly made to the High Court under the provisions of s. 20.

Mr. Clarke for the respondent, the Nairobi City Council, raised the preliminary objection that this Court had no jurisdiction to hear this appeal. He relied on the provisions of s. 66 of the Civil Procedure Act (Cap. 5) and of the various provisions of that Act and of the Civil Procedure Rules.

Section 66 gives a general right of appeal from the High Court to this Court and states:

“Unless otherwise expressly provided in this Ordinance, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie from the decrees or any part of decrees and from the orders of the High Court to the Court of Appeal for East Africa.”

There are two questions here. First, does an appeal lie to this Court from the decision of the High Court under s. 20 (1) of the Valuation for Rating Act (Cap. 266) and secondly, if an appeal does lie, was the decision given in this case, a decree or an order of the High Court from which an appeal lies as of right or was it an order from which an appeal only lies with leave. In this case leave to appeal to this Court was not given either by the High Court or by this Court.

The question as to whether an appeal lies from a decision of the High Court on a matter that goes before it by virtue of some Statutory provision other than through the normal procedure as laid down by the Civil Procedure Act and the Civil Procedure Rules has been considered by this Court in several cases.

I would in particular refer here to the decisions of this Court in the cases of *Sheikh Noordin Gulmohamed v. Sheikh Brothers Ltd.* (1951), 18 E.A.C.A. 42 and that of *Cowasjee Dinshaw & Brothers (Aden) Ltd. v. Cowasjee's Staff Association*, [1961] E.A. 436.

In the Gulmohamed case in his leading judgment Lockhart Smith, J.A., referred to what I consider to be the basic principle which would govern this question as set out by Viscount Haldane in a House of Lords decision in the English case of the *National Telephone Company v. Post-Master General*, [1913] A.C. 546 at p. 552 where my Lord said:

“When a question is stated to be referred to an established Court without more, it, in my opinion, imports that the ordinary incidents of the procedure of that Court are to attach, and also that any general right of appeal from its decisions likewise attaches.”

The following extract from the leading judgment of Newbold, J.A. (as he then was) in the decision of this Court in the *Cowasjee Dinshaw Case* at p. 441, fully explain the principles which, in my opinion, apply here:

“The authorities were reviewed in *Sheikh Noordin Gulmohamed v. Sheikh Bros. Ltd.* (1951), 18 E.A.C.A. 42, and at p. 48 the learned Justice of Appeal, who delivered the leading judgment, said:

‘Be that as it may, it must, in my opinion now be regarded as well settled that once a matter has arrived at an established court by way of appeal, the ordinary legislation dealing with further appeals from that court must be held to apply, unless excluded by special legislation, or unless the case can be brought within the principle laid down in the Rangoon group of authorities.’

In the present case the requirements which permit of an appeal to this court exist unless it falls within the principle of the Rangoon group authorities. This principle, I think, can be stated thus; does the established court hearing the appeal from the extra-judicial authority exercise special jurisdiction? If it does, then no further appeal lies merely by reason of the fact that an appeal lies from its decisions in the exercise of its ordinary jurisdiction. The question, therefore is; In this case was the Supreme Court, Aden, exercising a special jurisdiction in hearing the appeal upon points of law from the industrial courtBut

the right of appeal to the Supreme Court is specifically limited to points of law, a matter within the peculiar purview of the ordinary jurisdiction of the law courts, and in my view this imports the ordinary jurisdiction of the Supreme Court in a matter which, by the municipal law of Aden, is specifically appealable to this court.....

For these reasons in my view an appeal lies to this court.”

I have set out the provisions of s. 20 (1) under which the special case was stated to the High Court. This was a reference to the High Court only on a question of law and was a reference that normally, in my view, must have been made within the ordinary jurisdiction of the High Court. The High Court was carrying out the purpose and the functions for which it was established by the Constitution and by the Law. I am, therefore, of the view that the general right of the appeal given by s. 66 of Civil Procedure Act applies to the decision of the High Court in this case.

The further question then arises as to whether this is a decree or an order within the meaning of the Civil Procedure Act. An appeal lies as of right

against all decrees but only as of right against certain orders in accordance with the provisions of s. 75 of the Act.

There have been numerous decisions of this Court as to what is a decree. "Decree" is defined in s. 2 of the Act as the formal expression of an adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the "Suit". In s. 2 "Suit" shall mean all civil proceedings commencing in any manner prescribed, and then "prescribed" means "Prescribed by Rules" and then "Rules" is defined as meaning rules and forms made by the Rules Committee to regulate the procedure of courts. A further reference then has to be made to s. 81 of the Act which establishes the "Rules Committee" with powers to make Rules to regulate the procedure of civil courts in accordance with the provisions of that section.

After going through all these various definitions the result is that a decree is a formal expression of an adjudication of the court which conclusively determines the rights of the parties with regard to any matter in controversy in any civil proceedings commenced in accordance with Civil Procedure Rules.

In this case, it appears to me clear that this case was brought in the manner prescribed by s. 20 (1) of the Valuation for Rating Act. I have already set out this subsection in full and this provides:

"to refer such question of law for decision by the High Court, and such question shall be stated in the form of a special case."

This section specifically provides how these proceedings shall be commenced and it is to be noted that the Civil Procedure Rules make no specific provisions for the commencement and hearing of such an application. Order 34 makes specific provisions for parties to agree in writing to state any question of fact or law for the opinion of the court in the form of a special case. The provisions of order 34 do not, however, apply to this case, where the reference to the court is not made by the agreement of the parties but is a reference by a Valuation Committee under the specific provisions of s. 20 (1) of the Valuation for Rating Act.

I am, therefore, of the view that the decision of the Court was not a decree within the meaning of s. 66 of the Civil Procedure Act, but I am satisfied that it was an order of the High Court within the meaning of that section. I note here that the order as extracted in the record of appeal is headed "decree" but this, of course, is immaterial and cannot affect the real character of a document which as I have stated is in fact not a decree.

"Order" is defined in s. 2 of the Act as meaning

"the formal expression of any decision of a court which is not a decree, and shall include a rule nisi."

This definition covers and includes the decision in this case. It is a formal expression of the decision of the High Court acting in its judicial capacity as a civil court and is not a decree. I have not dealt with the question as to whether this was a reference to the High Court in its civil jurisdiction as in my view, this must undoubtedly be so.

The further question then arises:

Is this an order appealable as of right or only with leave? Section 75 of the Civil Procedure Act applies and this provides inter alia:

"An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted."

Section 75 then sets out the orders from which an appeal lies as of right and so does O. 42 of the Rules. The order in this case does not come within any of these provisions. Section 76 of the Act is also relevant, as this section states, inter alia:

“Save as otherwise expressly provided, no appeal shall lie from any order made by a court in the exercise of its original or appellate jurisdiction.”

I would also refer here to s. 79 of the Act which provides:

“The provisions of this Part relating to appeals from original decrees shall, as far as may be, apply to appeals:

- (a) from appellate decrees; and
- (b) from orders made under this Ordinance or under any special or local law in which a different procedure is not provided.”

It appears to me that s. 79 does not confer any right of appeal in respect of appellate decrees or orders but this section only applies the other provisions of part 6 applicable to appeals from original decrees to appeals from appellate decrees or orders. The actual right to appeal from appellate decrees or from orders are all those specifically set out and given by s. 72 and s. 75 of the Act respectively.

I am, therefore, of the view that this decision is an order within the meaning of s. 75 of the Act and is an order in respect of which an appeal only lies to this Court with leave of the High Court or of this Court. Leave of appeal has not been obtained in this case and I would, therefore, uphold the preliminary objection and hold that this appeal is not properly before this Court and should accordingly be struck out.

This would dispose of the appeal but as, however, I might be wrong in my interpretation of the statutory provisions and as in any event the substantive question in this appeal is on a point of public importance and has been fully argued before us, I would shortly deal with the appeal itself.

The reference to the High Court was for the purpose of obtaining a decision as to whether what is referred to as the “Arusha Town Council Case” was a “cause particular” within the meaning of s. 4 (1) (d) of the Valuation for Rating Act.

The relevant portion of s. 4 (1) reads as follows:

“It shall be lawful for a local authority, either on their own initiative or at the request of any person, from time to time and at any time to cause a valuation to be made as at the time of valuation of:

.....(a)

.....(b)

.....(c)

- (d) any rateable property which, from any cause particular to such rateable property arising since the time of valuation, has materially increased or decreased in value,

and to include such valuation in a supplementary valuation roll as hereinafter provided.”

The facts are by no means clear in the case stated, but the advocates before us agree that this matter arose from an application by the appellant for the Railway property in Nairobi to be re-valued on the principles set out in the case of the *Arusha Town Council v. General Manager E.A.R. & H.*, [1966] E.A. 358 and included in the Supplementary roll.

In his judgment the trial judge held that the appellant had not shown that the “Arusha Case” had had any effect at all on the value of railway property in Nairobi. He then considered the meaning of the word “Value” in s. 4 (1) (d) and held that this must be construed in its ordinary and natural sense and he then held:

“In the light of this conclusion, since it has not been shown that the value of the property in question has been materially increased or decreased in value, it is clear that the *Arusha decision* was not a “cause” in the sense defined by the paragraph: i.e. a cause of material increase or decrease in value. It is accordingly unnecessary to consider whether if it had been a cause it could have been described as a cause “Particular” to the rateable property in question, and I will be content with remarking that Mr. Clarke for the City Council has put forward powerful arguments to the contrary.”

It will be necessary to shortly consider the “Arusha Case”. This was a decision of this Court on a valuation of Railway property under the Local Government (Rating) Ordinance (Cap. 317) of Tanzania. The main question before the Court then was what was the proper method of valuation. In the end the Court decided and here I quote from the judgment of Spry, J.A., who wrote the leading judgment:

“I am satisfied that the land cannot be valued on the comparative basis, for lack of any comparable land. I accept the general proposition that the basis of valuation must be the capacity of the land to earn profits when used exclusively for Railway purposes.”

It may be that the principles laid down in the case should equally well be applied to Kenya in the interpretation of the provisions of the Valuation for Rating Act of Kenya but the Arusha decision does not lay down or create any new law in Tanzania. What it does do is to explain and declare how the existing law in Tanzania should be interpreted and dealt with and this decision should be followed by the Court in Tanzania and in certain circumstances by the Courts in Kenya. Even however if the Arusha decision does apply to the interpretation of Valuation for Rating Act in Kenya, this decision does not change the law in Kenya. It would only help to explain and determine how the existing law should be interpreted.

I find it difficult to understand how such a decision even if it did affect the method by which a Valuation Court should value a property can be said to be a “cause particular” to a property which materially increases or decreases its actual value. In this respect I entirely agree with the trial judge that the word value in s. 4 (1) (d) must be construed in its ordinary and natural sense and this must mean its actual value at the time of the valuation.

I agree that a particular law can considerably affect the actual value of property, thus a law prohibiting the user of land for a particular purpose might considerably decrease its value, but the Arusha Case only deals with the method which should be applied by a Valuation Court and while it may considerably affect the eventual value to be placed on property for the purpose of the particular act, it does not in any way affect the actual or real value of the property.

I would, therefore, have answered the first question in the case stated by saying that the “Arusha Town Council Case” is not a “cause particular” within the meaning of s. 4 (1) (d) of the Act as it does not in any way change the law in Kenya and in any event can only be of assistance in Kenya in interpreting the provisions of the Valuation for Rating Act in order to determine the correct method to be used in the valuation of property and has not, in the circumstances, of this case, been shown to have materially increased or decreased the actual value of the property.

I would, therefore, have in any event dismissed the appeal. For the reasons that I have stated, I would order that the appeal be struck out with costs to the respondent, which cost should include the hearing of the appeal *de bene esse*.

Spry JA: I have had the advantage of reading in draft the judgment of Duffus, V.-P., in which are set out all the facts with which this appeal is concerned and I shall not repeat them.

As regards the preliminary objection, I am fully satisfied that the decision of the High Court from which it is sought to appeal was a decision of a civil court and not the exercise of consultative jurisdiction (see *Commissioner of Lands v. Concrete Works Ltd.*, [1958] E.A. 254). It was not a decree, because a case stated under s. 20 of the Valuation for Rating Act is not a suit. It follows, in my opinion, that it must be an order. (In this connection, see *Mansion House Ltd. v. Wilkinson* (1954), 21 E.A.C.A. 98.) As an order, leave to appeal is necessary under s. 75 of the Civil Procedure Act, since it clearly does not fall within any of the classes of order from which an appeal expressly lies as of right. Leave to appeal was not sought or obtained, and I therefore agree that the appeal is incompetent and must be struck out.

As regards the merits of the intended appeal, like Duffus, V.-P., I would have dismissed it, but for a different reason. In my opinion, a decision of a court may very well affect the value of a piece of land. As a general proposition, I do not think that land has any value other than what a purchaser would pay for it and if the effect of a decision is to make the land more or less attractive to a potential purchaser, the result must be to raise or lower the value. I have said “As a general proposition” because there are, of course, express statutory provisions which give particular meanings to the word “value”. One of the factors that a potential purchaser takes into account in deciding the price he is prepared to pay is the amount of the outgoings he would have to pay as owner of the land. Therefore if a decision will lead a potential purchaser to think, rightly or wrongly, that the rates payable will be increased or decreased, it seems to me that that decision will have affected the value of the land.

The learned judge did not, however, hold that the decision in the *Arusha* case could not materially have affected the value of the railway land in Nairobi but only that it had not been proved that it had done so. Mr. Khaminwa, for the General Manager, submitted that the way the case was presented by the valuation committee, posing questions of law, precluded the calling of evidence of fact. I think there is merit in this submission. Since only questions of law can be submitted to the High Court under s. 20 and having regard to the way in which the questions were framed, I think the first question posed in the case stated had to be read as assuming, for the purpose of the case stated, that the value of the land had materially been affected by the decision in the *Arusha* case.

Where, however, I do not agree with the intended appellant is that I cannot see how a decision relating to land in Arusha can be said to be “particular” to land in Nairobi, merely because the lands are in the same ownership and are reserved for the same purposes. The decision may equally affect land in other ownership and reserved for other purposes. I would not attempt to define the word “particular” but its use clearly excludes matters which are general in their effect and it is to be noted that the cause has to be particular to the land, not to the owner of the land. For these reasons, had the appeal been competent, I would have dismissed it.

Sir Charles Newbold P: I have had the advantage of reading in draft the judgment of Duffus, V.-P. For the reasons he has given I agree that the appeal is incompetent and should be struck out with costs, and it is so ordered.

Appeal struck out.

For the appellant:

J. M. Khaminwa and D. R. Kuss

For the respondent:

P. A. Clarke

Thande and others v Montgomery and others
[1970] 1 EA 341 (CAN)

Division: Court of Appeal in Nairobi
Date of judgment: 19 December 1969
Case Number: 56, 57 and 58/1969 (28/70)
Before: Sir Charles Newbold P, Duffus VP, and Spry JA
Sourced by: LawAfrica
Appeal from: The High Court of Kenya – Kneller, J.

[1] Constitutional Law – Elections – Preliminary Election – Whether High Court has jurisdiction to determine questions in respect of preliminary election on an election petition – Constitution of Kenya, s. 44; National Assembly and Presidential Elections Act 1969 (K.); Parliamentary and Presidential Elections Regulations 1969 (K.).

Editor’s Summary

Suits were filed in the High Court asking for declarations concerning preliminary elections in certain constituencies. In these suits injunctions were sought postponing nomination day in respect of these constituencies and thereby preventing the persons winning the preliminary elections from being returned to Parliament. The judge refused the injunctions, holding that the applicants had another remedy available to them in petitions to the election court subsequent to the election, and further that in the circumstances he would not exercise his discretion to grant injunctions. The applicants appealed.

Held –

- (i) a preliminary election is part of a Parliamentary election and the High Court has jurisdiction to determine any question in respect of a preliminary election;
- (ii) “election” in the Constitution of Kenya, s. 44, and in the National Assembly and Presidential Elections Act 1969, s. 19, includes “Preliminary election”.

Appeals dismissed.

No cases referred to in judgment.

Judgment

Sir Charles Newbold P: This is an appeal or, to be more accurate, three appeals which have been heard together from a decision given by the High Court, yesterday on three chamber summonses which were heard together before him, each of these summonses asked for injunctions against specified parties. The chamber summonses were in each case taken out in suits which had been brought in two cases by unsuccessful candidates in the Preliminary Elections in their constituencies and in the third case by an elector in his constituency in which there was held a Preliminary Election. These suits asked for certain declarations, but it was clear that there was no possibility of the suits coming to trial and being determined before the nomination day, which is tomorrow 20 December. Accordingly, the plaintiffs in each of those suits took out these chamber summonses directed in each case to Mr. Montgomery, as Supervisor of the Elections, Mr. Kangethi as Returning Officer in one of the constituencies and equally the Returning Officer in the other two constituencies, and also to the successful candidate in each of the three constituencies in the Preliminary Elections.

The chamber summonses sought injunctions directed to each of the persons named. Each injunction, if granted, would have had the effect of postponing nomination day from tomorrow, 20 December, to some unknown date and would, indeed, have had the effect of requiring a new election in each of those constituencies. Each of the summonses was supported by an affidavit which alleged various malpractices, but to which, indeed, we have had no time to direct our attention. It has been, however, pointed out to us that the trial judge in coming to his conclusion on these applications accepted that the allegations were such, if they were proved, that they might substantially affect the elections in each constituency. The matter was heard at great speed by the High Court and has come to us with even greater speed, with the consent freely given by Mr. Potter, who appeared on behalf of the first two respondents in each of these appeals. He waived any of the requirements which would have necessitated greater delay in the hearing of these appeals. We granted the motions which came before us this morning, with the result that there has been a considerable departure from normal procedure, because we were satisfied that the appeals raise a matter of great public importance and also, obviously a matter which was to be dealt with great urgency. It is, however, regrettable that the persons who are most concerned with the three appeals, that is the apparently successful candidates, were not served with the appeal proceedings and consequently have not appeared before us to urge anything. Had we come to the conclusion that any action as a result of our decision would have prejudiced their position, I cannot see any alternative but to have ordered an adjournment in the circumstances of this case. As Mr. Potter rightly pointed out, to have done otherwise in this case would have been to vitiate the Preliminary Elections merely on allegations of malpractices. However, in the view which I take, that position does not arise.

Kneller, J., having heard the applications for the injunctions, refused them on two grounds:

First, that it was unnecessary to grant them as the plaintiffs, who were the applicants to the summonses before him, had a remedy before another court if their allegations were correct; and, secondly, that the circumstances in the exercise of his discretion he would not have granted the injunctions. The applicants appealed against that decision. As regards the first point, the submission presented to us is that it is only the High Court, in an action for a declaration, which would have jurisdiction to hear and determine any question of malpractice at the Preliminary Elections. The details of that submission I shall refer to shortly. As regards the second point, it was also submitted on behalf of the appellants that in the circumstances of this case the trial judge should have exercised his discretion in their favour and granted the injunctions.

Turning to the first matter under the appeal, that is, whether the appellants would have any remedy before any other court, the position is that under s. 34 of the Constitution a person shall not be qualified for election as a member unless, inter alia, "he is nominated, in the manner prescribed by or under an Act of Parliament, by a political party". Section 44 (1) of the Constitution then gives to the High Court "jurisdiction to hear and determine any question whether (a) any person has been validly elected as a member of the National Assembly". In sub-s.(4) of that section it is provided that "Parliament may make provision with respect to (a) the circumstances and manner in which, the time within which and the conditions upon which an application may be made to the High Court for the determination of a question under this section; and (b) the powers, practice and procedure of the High Court in relation to any such application". Following on that the National Assembly and Presidential Elections Act 1969, was passed and under s. 17 of that Act it is provided that "a person shall be deemed to be nominated by a political party for election as

a member of the National Assembly for the purposes of para. (d) of s. 34 of the Constitution if he is declared to have received the greatest number of votes at a Preliminary Election held in accordance with this section and the Regulations". Subsection (3) of that section sets out that "the voting at all preliminary elections held within a constituency as part of a particular Parliamentary election shall be by secret ballot". Then s. 19 deals with petitions. It sets out that "every application to the High Court under the Constitution to hear and determine a question whether – . . . (b) any person has been validly elected as a member of the National Assembly . . . shall be made by way of petition, and shall be tried by an election court consisting of three judges". Section 20 deals with the presentation of petitions and under it a petition questioning a return or an election upon various grounds have to be presented within specified periods. Finally, under that Act there were made the Parliamentary and Presidential Elections Regulations 1969. Regulation 46 deals with the return made by the returning officer as a result of the Preliminary Elections and reg. 48 (1) states that "a person named in a notice under para. (3) of reg. 46 of these Regulations shall be deemed to be duly nominated for the Parliamentary election following the forthcoming election" if certain actions are taken. In s. 2 of the Act of 1969 "election" is defined as "a Parliamentary election and a Presidential election" and "preliminary election" is defined as "a preliminary election held by a political part in accordance with s. 17 of this Act preparatory to a Parliamentary election".

Having set out those provisions the submissions of the appellants in this case are quite simply as follows: That under s. 19 of the Act the High Court may only determine or enquire into a petition relating to an election and that, as under s. 2 election means Parliamentary election, the consequence is that the election court cannot enquire into any alleged malpractice which took place at the preliminary election.

This submission hinges on the definition of election in s. 2 of the Act and also on the provisions of reg. 48, which state that a person named in the notice, which would in this case be successful candidate at the preliminary election, "shall be deemed to be duly nominated for the Parliamentary election following the preliminary election". If this was so, then it would seem that there was a possibility of great injustice arising in a matter which would strike at the very roots of the proper administration of the Government of Kenya, because it might result in a person being elected to the national parliament consequently upon improper practice with the result that he would not be a true representative of his party and yet there could be no enquiry into it. It is obvious that no country would set out to create such a position. It is true that if the legislation so sets out clearly, then courts would have no alternative but to abide by the legislation. I have no doubt, however, that no court would, if it was possible to do otherwise, construe any legislation in such a manner as to give rise to conditions which would affect improperly the whole administration of the Government of the country.

The argument presented by the appellants hinges to a very large extent upon the words "deemed to be duly nominated" in reg. 48. It is submitted that once a candidate is nominated those words would preclude the election court from enquiring into any malpractice in the course of the preliminary elections. I cannot accept that such words should be so construed. The Constitution sets out in s. 44 that the High Court shall have "jurisdiction to hear and determine any question whether . . . any person has been validly elected as a member of the National Assembly" and I am satisfied that for these purposes the preliminary election is a part of the Parliamentary election and any question in respect of the preliminary election is a matter with which under the Constitution the High Court is invested with jurisdiction to determine. That being so, it is

not possible for any words in these Regulations to have an effect contrary to the provisions of the Constitution. Of necessity any such words must be construed in a manner which would give effect to, and not in a manner which would vitiate, the Constitution. Further, in so far as the argument presented to this Court is based upon the definitions of “election”, “preliminary election” and “parliamentary election” in s. 2 of the 1969 Act, I would point out that those definitions are specified stated to be subject to the provisions “unless the context otherwise requires”. I am quite satisfied that the context in s. 19 of the National Assembly and Presidential Elections Act, which is designed to give effect to s. 44 of the Constitution, would otherwise require so as to enable the High Court to exercise jurisdiction in an election petition in relation to any improper practice which has occurred in any part of the elections. “Election” in the sense which I have used that word and in the sense which I am satisfied it is used in s. 44 of the Constitution and s. 19 of the Act would include the preliminary election. Indeed, s. 17 (3), as I have already stated, specifically states that the preliminary election is part of a Parliamentary election.

I have come, therefore, with no hesitation whatsoever, to the conclusion that the High Court has full jurisdiction to enquire, in an election petition brought after nomination day, into the validity of an election, which validity in turn must depend upon the preliminary election having been held in accordance with law; and the law requires that a preliminary election shall not be held in circumstances where there has been corrupt practices or illegal practices. It seems to me therefore that there was absolutely no necessity for these injunctions. Whether the parties choose to proceed with the suit is a matter for themselves. I am, however, satisfied that any improper practice can be challenged by way of an election petition and I agree entirely with what I understand to be the decision of the judge of the High Court in his arriving at a similar conclusion. That being so, the necessity for considering whether or not to grant an injunction does not arise. Accordingly, the appeals should be dismissed.

We have in the course of the hearing of the arguments referred to the very short time that has been made available to us to consider this matter. I appreciate, as Mr. Deverell pointed out, that if the appellants’ submissions were correct there would be very little time. That is a position which really will not arise in the future because, if my brethren agree, it will be open to the unsuccessful candidate to challenge any person by way of election petition. It is, as I have said, unnecessary to turn to the second part of this appeal. For these reasons, in my view, the appeals should be dismissed.

Duffus VP: I entirely agree with my lord President that these appeals be dismissed for the reasons that he has stated. In the circumstances of this case it would, in my view, be quite wrong and unjust to grant these interlocutory injunctions, especially as the candidates concerned, the three respondents, have not had the opportunity of hearing and opposing the application and in view of the effect it would have on their election at the preliminary elections. I am also of the view that the preliminary elections are part of the procedure for the election of members for the National Assembly and I agree that the appellants may if they so desire, petition to the High Court under the provisions of s. 19 of the National Assembly and Presidential Elections Act 1969.

Spry JA: I also agree and I base my reasons on one simple proposition, s. 44 of the Constitution gives the High Court jurisdiction to decide whether a person has been validly elected. I cannot see that a person can be said to be validly elected if his nomination was procured in an improper way. I think, therefore, that the word “deemed” in reg. 48 must be read as meaning

“shall be deemed, unless the contrary is proved”. Therefore, since a remedy is available to the appellants after nomination, there is no necessity now for the granting of injunctions. I agree that the appeals should be dismissed.

Appeals dismissed.

For the appellants:

J. A. Couldrey and W. S. Deverell (instructed by *Kaplan & Stratton*, Nairobi)

For the respondents:

K. D. Potter, Q.C. (Special Legal and Constitutional Adviser) and *T. B. H. Phillips* (Senior State Counsel)

Mumbi v Republic
[1970] 1 EA 345 (HCK)

Division: High Court of Kenya at Nairobi
Date of judgment: 22 September 1969
Case Number: 782/1969 (44/70)
Before: Mwendwa CJ and Trevelyan J
Sourced by: LawAfrica

[1] *Criminal Law – Receiving stolen property – Knowledge that goods stolen at time of receipt necessary.*

[2] *Criminal Law – Retaining stolen property – Knowledge that goods stolen at time of retention necessary.*

[3] *Criminal Law – Retaining stolen property – No longer an offence of retaining stolen property for oneself – Penal Code, s. 322 (K.).*

Editor’s Summary

The appellant had been convicted of dishonestly retaining a bedsheet knowing or having reason to believe it was stolen. She had given an explanation that she had bought it from a named individual known to the police and who was not called to give evidence. On appeal:

Held –

- (i) on the facts, it could not be said that the appellant had any reason to believe the sheet was stolen;
- (obiter) (ii) in the offence of receiving stolen goods the knowledge or reason to believe the goods to be stolen must relate to the time of their receipt by the accused;

- (iii) in the offence of retaining stolen goods, the knowledge or reason to believe must relate to the time of the retention removal disposal or realisation for the benefit of another person;
- (iv) there is no longer an offence of retaining stolen property for oneself.

Appeal allowed.

No cases referred to in judgment.

Judgment

Mwendwa CJ: The appellant a girl of 17 years of age and living alone was charged with and convicted contra s. 322 (1) of the Penal Code of handling stolen property it being alleged that she “(otherwise than in the course of the stealing) knowingly or having reason to believe it to be stolen dishonestly retained one bedsheet the property of Francis Waithaka”.

The sheet, purchased some two years ago for twenty-two shillings was, on 20 May last, stolen from the house in which the complainant lived and was, some time in June purchased by the appellant (together with another sheet)

for six shillings. When it was stolen the sheet was not being used upon a bed but as a curtain.

In his judgment the resident magistrate said:

“It is necessary for the prosecution to prove that the sheet was stolen and was in the accused’s possession but it is not necessary to prove that the accused knew or ought to have known of the particular offence by reason of which the sheet was in fact stolen goods. . . . She said that the name of the person who sold it to her is one Zaida Adi, that he is about 19 years of age and jobless. . . . She did not wish to call this person. P. W.4 apparently found this person and brought him to the police station but he has not been a witness in this case; P.W.4 stated that he was a young person and unemployed. Accused did not strike me as being a truthful witness and I do not believe that she could have believed that Adi had come by this sheet honestly as he has been without employment to her knowledge for so long. Furthermore she herself admitted in cross-examination that Shs. 3/- for the sheet was very cheap. She can produce no receipt for the money which she says that she paid to Zaida Adi and she says she did not ask him for one. I consider this proof that she knew (apart from the low price . . .) well that the sheet was dishonestly obtained by Zaida Adi. Her retention was clearly in these circumstances dishonest.”

We do not, with respect, subscribe to much of what is there said. The complainant gave a simple, straightforward statement that she had bought the sheet from a man whom she named and that man was found and brought to the police station. To our minds it is surprising that he was not made a prosecution witness whilst it is not surprising that the appellant did not wish to call him. That he is said to have been unemployed for so long a period of time is surely as good a reason for believing as for disbelieving that he might wish to sell off his old sheets at a cheap price. Moreover the appellant told the court “I have never heard him being called a thief. We have been brought up together in the same place.” As for price, sheets are primarily for use upon beds and the fact that this particular sheet after some two years was being used as a curtain could indicate that its condition was not good enough for its primary purpose so that there is little if any probative value in the matter of price. However, what in the end weighed so heavily with the magistrate was that the appellant did not seek a receipt. But this was not a matter of any real importance in the circumstances of the case for this was not a shop transaction. On the facts it could not, and cannot, be said that the appellant knew or had reason to believe that the sheet was stolen and she should have been acquitted.

We take leave to doubt that there was a case against the appellant in law in any event; that we go no further than this is because the matter was not argued before us. The section under which the appellant was charged reads as follows:

“A person handles stolen goods if (otherwise than in the course of the stealing) knowing or having reason to believe them to be stolen goods he dishonestly receives the goods, or dishonestly undertakes, or assists in, their retention, removal, disposal or realisation by or for the benefit of another person, or if he arranges to do so.”

It takes the place of the former one which dealt with receiving and retaining stolen property, but we must interpret it as it has been drafted, and it seems to us that in regard to the offence of receiving the knowledge or the reason to believe the goods to have been stolen must be related to the time of their receipt by the accused whilst in respect of the offence of retaining, the knowledge relates to the time when he undertakes or assists in their retention, removal, disposal or realisation “*by or for the benefit of another person . . .*”. We have

stressed these words because it seems to us that retaining stolen property for oneself is outside the section. If that is so the appellant was charged with an offence the particulars of which are unknown to the law.

The appeal is allowed, the conviction quashed, and the sentences set aside.

Appeal allowed.

The appellant was absent and unrepresented.

For the respondent:

K. Mutta (State Counsel)

Saranji v Attorney-General
[1970] 1 EA 347 (HCU)

Division: High Court of Uganda at Mbale
Date of judgment: 23 January 1970
Case Number: 18/1968 (57/70)
Before: Saldanha J
Sourced by: LawAfrica

[1] *Conversion – Defenses – Jus tertii – Authority of owner – Defendant in an action for conversion ordinarily may not assert the defense of a jus tertii, but can if he took under authority of true owner.*

[2] *Conversion – Police – Seizure of stolen goods – Seizure of stolen goods by police to return to rightful owner is not conversion.*

[3] *Police – Powers – Return of stolen goods – Police have implied authority of true owner to recover and return his stolen goods.*

[4] *Police – Procedure – Return of stolen goods – Requirement of magistrate's order for return – Order optional – Police Act (Cap. 312), s. 36A (U.).*

Editor's Summary

A car dealer bought a car innocently and for value and subsequently sold it to the plaintiff. The car had been stolen and had a forged registration card. The police took the car from the plaintiff and returned it to its true owner without securing a magistrate's order to return stolen goods. The plaintiff sued the Attorney-General for damages for wrongful detention or conversion.

Held –

- (i) the provisions of the Police Act, s. 36A, providing for a magistrate's order for the return of stolen goods are optional and not mandatory;
- (ii) the right of a third person is normally not a defence to an action for conversion, but acting under the authority of the true owner is;
- (iii) the police have implied authority of the true owner to take and return his stolen goods;
- (iv) the seizure was not conversion.

Case dismissed.

Cases referred to in judgment:

- (1) *Glenwood Lumber Co. Ltd. v. Phillips*, [1904-1907] All E.R. Rep. 203.
- (2) *Rowland v. Divall*, [1923] 2 K.B. 500.

Judgment

Saldanha J: The plaintiff is an Asian trader of Mbale. He is claiming damages from the Uganda Government for the wrongful

detention or for the conversion of his motor car by the police. He has sued the Attorney-General under the Government Proceedings Act.

This claim arises in the following circumstances. In March 1967, the plaintiff bought from Mbale Car Mart Ltd. a Peugeot 404 Estate Car or Station Wagon bearing the registration number UKF 539.

The agreed price was Shs. 20,500/-. He gave in part exchange his own secondhand car for which he was given a credit of Shs. 2,000/-. For the balance he gave a cheque and some promissory notes.

Mbale Car Mart Ltd. bought this car from a Goan called Joseph Almeida. According to Mr. Mitha, a director of Mbale Car Mart Ltd. who gave evidence for the plaintiff, Almeida brought this car to his showroom at 7 February 1967. He was accompanied by a man called Mohamed from Nairobi and another called Suluman Gani who had a motor vehicle repair shop in Mbale.

When Almeida brought the motor vehicle it had the registration number KKM 601, which is a Kenya registration number. Mitha bought the car for Shs. 14,000/- and paid Almeida by a cash cheque. Almeida handed over a registration card. It shows a Mr. F. Hutchinson as being the first registered owner and Joseph Almeida the second owner.

The car was in fairly good shape when Mitha bought it except for a dent in one of the doors – and worn tyres. Mitha later found that the spare tyre had had a burst.

Mitha produced the registration card to the Customs officer, the Licensing officer and the Inspector of Vehicles – and had the car registered in Uganda as UKF 539.

Before selling it to the plaintiff Mitha replaced the tyres at a cost of Shs. 955/- and repaired the dent and had the car sprayed at a cost of Shs. 220/-. The cost of registration in Uganda was Shs. 500/-, the transfer of the car into the name of the company cost Shs. 200/- and another Shs. 200/- for transfer to the name of the plaintiff. The insurance came to Shs. 1,581/- and the interest Shs. 1,100/- making the total cost of the car Shs. 18,776/-. I have already said that he sold it to the plaintiff for Shs. 20,500/-.

The plaintiff used this car until June 1967, during which period he clocked a mileage of 1,500 to 2,000 miles.

Sometime in June 1967, a police officer collected this car from the plaintiff. He told the plaintiff that this car had been stolen and he needed it for purposes of investigation.

As several months had elapsed and the plaintiff did not get his car back, in November 1967 he wrote to the police in Mbale asking that the car should be returned to him. He received no reply. He wrote again in January 1968. Again he received no reply. He then placed the matter into the hands of his advocates.

The plaintiff's advocates wrote to the Police Mbale asking what the position was. The advocates received a reply stating that the car had been stolen from Kenya and had been returned to its lawful owner on the instructions of the Attorney-General and that they should contact the Solicitor-General for any further information.

There was then an exchange of letters between the plaintiff's advocates and the Solicitor-General.

By letter dated 1 October 1968 the plaintiff's advocates were informed that the car had been returned to its owners by the police on the advice of the Solicitor-General and that if the advocates wished to commence legal

proceedings against the Government the Attorney-General would accept service of process.

The advocates then sued the Attorney-General for damages for the wrongful detention or conversion of the motor vehicle.

The Uganda Police, no doubt after carrying out investigations, had handed over the car to Singer Sewing Machine Co. in Nairobi. The police say that this company is the true owner of the motor car. The defendant called Mr. Newson, a Sales Manager of Singer Sewing Machine Co. from Nairobi. This witness testified that the motor vehicle in question was bought brand new from Marshalls in Nairobi in July 1966. He produced an invoice. He says this motor vehicle was registered in the name of Singer Sewing Machine Co. under the registration number KKK 672, that it has never changed ownership, that it was stolen in Nairobi in early 1967, its theft reported to the police in Nairobi and the car was recovered in Uganda and returned to them later in 1967, presumably by the Uganda Police.

The defendant also called Mr. Ogana, an executive officer of the Motor Vehicle Registry at Nairobi. This witness testified that motor vehicle KKK 672 was a brand new Peugeot 404 Station Wagon whose registered owner was Singer Sewing Machine Co. and that there has been no change of ownership. He said that there had been a theft of blank registration cards from his Registry and that the card was a forgery. The number KKM 601 which is the number which appears on the registration card is the registration number of a Morris van owned by Pan American World Airways of Nairobi.

There is no doubt at all that this car which at three different times bore three different registration numbers, KKK 672, KKM 601 and UKF 539 is one and the same car. The engine and chassis number mentioned in the registration card produced by Mr. Newson is 4877033 (Peugeot motor vehicles have the same number for both chassis and engine). The engine and chassis number mentioned in the registration card is also 4877033. When Mr. Mitha bought this car from Almeida he checked the engine and chassis number of the car and it was 4877033.

There is equally no doubt that this car belongs to the Singer Sewing Machine Co. of Nairobi, and was stolen from them in early 1967. When it was sold to Mbale Car Mart Ltd. the registration number, KKM 601 which it bore, was a false number and the registration card was a forgery.

There is no doubt that Mbale Car Mart Ltd. are dealers in new and secondhand cars, that they are a reputable company and that when Mitha bought the car from Almeida he bought it in good faith and had no reason to believe that it was stolen. He bought it for a reasonable price and having regard to the money which his company expended on it he sold it for a reasonable price. In the same way the plaintiff bought the car in good faith. He had bought it from a reputable dealer, paid a fair price and had no reason to believe that the car was stolen.

The question which I have to decide is whether in returning the car to its lawful owner the police have violated any legal right of the plaintiff, whether they have committed a tort. If they have they are undoubtedly liable to the plaintiff in damages.

The defendant relies upon the provisions of s. 23 (1) of the Sale of Goods Act (Cap. 79) which provides as follows:

“Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the

goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

The defendant argues that as this car was stolen the thief did not have a good title and therefore could not pass a good title, that in as much as Mbale Car Mart Ltd. did not have a good title, the plaintiff who bought the car from Mbale Car Mart Ltd. did not acquire a good title either, and therefore, that as he has neither the right to ownership nor to possession of the car the police in returning the car to its rightful owner violated no right vested in the plaintiff.

In England a purchaser of goods in market overt acquires a good title provided he buys them in good faith and without notice of any defect or want of title on the part of the seller (s. 22, Sale of Goods Act 1893).

And where goods have been stolen and the offender is prosecuted to conviction the property reverts in the person who was owner notwithstanding any intermediate dealing whether by sale in market overt or otherwise. (Section 24, Sale of Goods Act 1893.)

If the provisions of the English law regarding sale in market overt were operative in Uganda and if Sarangi had bought the car in market overt provided he bought it in good faith and without notice of any defect or want of title he would have acquired a good title to the car and the property in the car would not have reverted in Singer Sewing Machine Co. until the thief had been prosecuted to conviction.

But the provisions of the English law regarding sale in market overt are missing in the Uganda legislation and there is no dispute that the question of sale in market overt does not arise. Unless the plaintiff can point to some provision in our law by virtue of which he could acquire a good title, he did not have a good title and could not have acquired one.

Mr. Mohamed, who appeared for the plaintiff, has referred me to the passage in Halsbury's Laws of England (3rd Edn.), Vol. 38, at p. 799. The relevant part is as follows:

"If a person who was in possession of goods at the time of the act complained of sues in trover or detinue, the defendant cannot set up as a defence a title under whom he does not claim."

He refers me also to the following passage in Clerk and Lindsell on Torts (12th Edn.), at p. 597:

"He may sue in trespass anyone who disturbs his possession, and in such an action it is no answer for the defendant to show that the title and right to possession is in another person: *jus tertii* is no defence to the action, unless the defendant can show that the act complained of was done by the authority of the true owner."

Both the above passages refer to the defence of *jus tertii* and Mr. Mohamed's contention is that the defendant cannot set up the defence of *jus tertii* against the plaintiff who was in possession. The short answer to that is that the Uganda Police would have had the implied authority of the owners to return the car to them.

Mr. Mohamed cites the case of *Glenwood Lumber Co. Ltd. v. Phillips*, [1904-1907] All E.R. 203 and refers me to the following passage in the headnote at I:

"It is a well-established principle in English law that possession is good against a wrongdoer and the latter cannot set up a *jus tertii* unless he claims under it."

As I understand Mr. Mohamed he suggests that the police are wrongdoers because they have not complied with s. 36A of the Police Act. This section provides as follows:

“Where any property has come into the possession of a police officer in connection with criminal proceedings, or in consequence of any person being detained in connection with criminal proceedings, and no order of disposal has been made under the provisions of s. 303 of the Criminal Procedure Code, a magistrate may, on application either by a Police officer or by a claimant of the property, make an order for the delivery of the property to the person appearing to the magistrate to be the owner thereof, or, if the owner cannot be ascertained, order such property to be disposed of under the provisions of s. 36 of this Act as unclaimed property.”

There were no criminal proceedings in this case. There is no evidence as to why there were no criminal proceedings. And in any event the provisions of s. 36A with regard to getting an order from the Court are not mandatory.

There is no ground for holding that the police were wrongdoers for any other reason. The police are charged with the duty of prosecuting criminals and recovering stolen property. The car was presumably reported to the Uganda Police as having been stolen. The plaintiff has said that the police officer who took away the car told him that the car had been stolen. The car was taken away by the police for the purposes of investigation in the course of their duties.

Singer Sewing Machine Co. could always have recovered the car from the plaintiff, possibly by seizing it forcibly, certainly by an action at law. All that the police have done is to short-circuit the procedure by handing over the car to its lawful owner.

Other provisions of the law have been referred to by Mr. Mohamed and some other cases cited. I have perused all these. I find that they have no relevance.

In the circumstances the police were perfectly entitled to hand over the car to Singer Sewing Machine Co. The plaintiff has lost nothing because he can always sue Mbale Car Mart Ltd. and recover the full price under s. 14 (a) of the Sale of Goods Act which provides that in a contract of sale there is an implied condition on the part of the seller that in the case of a sale he has a right to sell the goods. *Rowland v. Divall*, [1923] 2 K.B. 500.

In the event of there being an appeal in this case and in the event of it being held that I had erred I would assess the special and general damages as follows.

After the police took away the car the plaintiff hired a car paying the hire charges of Shs. 1,500/- or Shs. 1,800/-. I would award him the lower sum of Shs. 1,500/- by way of special damages.

The plaintiff paid Shs. 20,500/- for the car. This was a fair price. He said he had used it for 1,500-2,000 miles. He estimates the depreciation at 30 cents per mile. He said there had been no increase in the price of cars while it was in his possession. Assuming he had used it for 2,000 miles the

depreciation amounts to Shs. $\frac{30 \times 2,000}{100} = \text{Shs. } 600/-$. Therefore the value of the car at the time when the police took it away would be Shs. 20,500/- less Shs. 600/-, that is to say, Shs. 19,900/-, which is the sum I would award him by way of general damages.

The plaintiff's suit is dismissed with costs to the defendant.

Case dismissed.

For the plaintiff:

Z. Mohamed (instructed by *Zahir Mohamed & Co.*, Mbale)

For the defendant:

G. M. Akankwasa (Senior State Attorney, Uganda)

Shah & others v New Africa Press Ltd
[1970] 1 EA 352 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	27 January 1970
Case Number:	211/1968 (61/70)
Before:	Saldanha J
Sourced by:	LawAfrica

[1] Defamation – Libel – Identification – Whether an admittedly libellous article was referable to the plaintiffs.

Editor’s Summary

On 22 January 1968, eight plaintiffs (and two other Asians?) were arrested and detained at Luziro Prison, Uganda, under Buganda Emergency Regulations until 17 February 1968. On 27 January 1968 an article appeared in a weekly publication. The article was headed:

“Conspiracy to forge Passports
10 Asians arrested in Uganda
Five seniormost officers of immigration
department suspended. Kampala.”

The article then described in detail the offences which it was alleged that these ten Asians were suspected of committing including conspiracy to forge passports and the issue of Citizenship Certificates. No names were mentioned in the article but members of the public gave evidence that they thought that the article (which the defendant admitted to be libellous) referred to the plaintiffs. About 900 copies per week of the newspaper were sold in Uganda.

The defendant failed to produce evidence of arrest of Asians connected with the alleged offences described by the article.

Held – the article constituted a libel on the plaintiffs.

Judgment for the plaintiffs.

No cases referred to in judgment.

Judgment

Saldanha J: Six civil suits have been consolidated into one. In civil suit 221 of 1968 the plaintiff is Mr. J. S. Shah, an advocate. In civil suit 244 of 1968 there are three plaintiffs. They are Gordhandas Odhavji Kotecha, Vallabhdas J. Thakker and Chimanlal Odhavji Kotecha. The plaintiff in civil suit 258 of 1968 is A. G. Sabur, in civil suit 259 of 1968 Abdul Gani Mohindur, in civil suit 260 of 1968 Kassamali Bhogatia and civil suit 261 of 1968 Pyarali Bandali. In all these cases the defendant is the same, namely New Africa Press Ltd.

The defendants are a limited liability company incorporated in Kenya. They print and publish a Gujarati language weekly called Navyug.

All these actions arose in consequence of an article which appeared in an issue of Navyug dated 27 January 1968. An English translation of the article is as follows:

“Conspiracy to forge Passports

10 Asians arrested in Uganda

Five seniormost officers of immigration
department suspended. Kampala.

On order from the Minister of Internal Affairs Ten Ugandan Asians have been ordered to be arrested. These ten Asians are suspected to have conspired to forge passports with five Senior most Immigration Officers. It is further alleged that this Asian gang was involved in issue of Citizenship Certificates.

The Ugandan C.I.D. suspected that some Asians and Senior Immigration Officers are involved in large scale conspiracy to forge passports and as a result thereof the above mentioned arrests were made, and it is believed that police will be able to get further information regarding the conspiracy from those arrested 10 Asians. This was revealed by a spokesman of the Police.

A spokesman of the Ministry of Internal Affairs has refused to give any official statement on alleged conspiracy to forge passports, but he added that they are keeping a close watch on the development and the C.I.D. will make a thorough inquiry into the matter.

Five Senior Immigration Officers of Uganda have been suspended in the above conspiracy and further police inquiry is continuing.”

The plaintiffs say that this article is a libel, that it refers to them, that this article meant and was understood to mean that they had been arrested because they had committed criminal offences or alternatively that they had been arrested because they were accused of being parties to illegal practices in relation to the Passport and Immigration laws of Uganda.

From the evidence adduced by the plaintiffs and their supporting witnesses it is clear that all these plaintiffs together with two other Asians were arrested by the Uganda Police on or about 22 January 1968, and detained at Luzira Prison until about 17 February 1968, when they were released. They were informed that they were being arrested and detained under the Buganda Emergency Regulations. Apart from this information no reason was given for their arrest.

The plaintiffs have adduced evidence to prove that shortly after their arrest, in the issue of *Navyug* dated 27 January 1968, there appeared the article complained of and that persons who read the article thought that it referred to the ten Asians including the eight plaintiffs who had been arrested.

The plaintiffs have adduced evidence to prove that this newspaper had a wide circulation in Uganda, about 900 copies per week being sold in Uganda.

The plaintiffs have adduced evidence to prove that they suffered in their character and reputation because they fell in the estimation of friends and acquaintances who had read this article, and those of the plaintiffs who were engaged as passport and immigration agents suffered financially by losing customers or clients.

Mr. Keeble, who appeared for the defendants in all these cases, does not challenge the publication of the article in question. He concedes that it is defamatory. Indeed it is difficult to see how he could have done otherwise. The heading alone accuses the ten Asians arrested of conspiracy to forge passports, which is a criminal offence. This theme is maintained in the article. It alleges that the ten Asians were suspected of having conspired with a senior immigration officer to forge passports and that it is alleged that they were involved in the issue of Citizenship Certificates. In one part of the article the ten Asians are referred to as a “gang”. A police spokesman is alleged to have said that the police hoped to get further information about the conspiracy from those arrested ten Asians. The article went on to say that the Uganda C.I.D. suspected that some Senior Immigration Officers and some Asians were

involved in a large-scale conspiracy to forge passports in consequence of which the ten Asians were arrested and five Senior Immigration Officers had been suspended.

There is no doubt in my mind that any ordinary, reasonable member of the public, reading this article would think that the ten Asians arrested, whoever they were, were suspected of having conspired with immigration officers to forge passports, or, at the very least that they were engaged in illegal practices in connection with passports and citizenship certificates.

There is nothing in the article to show who the ten Asians are. They are not mentioned by name, they are not even referred to as a class. Mr. Keeble argues that before it can be held that the article is defamatory of the plaintiffs it must be shown from the article itself that it could reasonably be said to refer to the plaintiffs. He argues that all that has been proved is that persons who thought that the article referred to the plaintiffs did so because they had heard in the bazaar or from gossip that the plaintiffs had been arrested, and that the article could have referred to any other ten Asians who may have been arrested.

The defendants have called no evidence. They have made no attempt either by calling evidence or by cross-examining the plaintiffs and their witnesses to show that any other ten Asians apart from those including the eight plaintiffs had been arrested. The evidence adduced shows that the eight plaintiffs and two other Asians were the only ten Asians arrested about that time.

The eight plaintiffs were arrested about the 22 January 1968. News in the bazaar travels fast and it was soon common knowledge that the eight plaintiffs had been arrested. Shortly afterwards, in the issue of Navyug dated 27 January 1968, this article appears. I think it is abundantly clear that an ordinary member of the Gujarati-reading public who had heard that the eight plaintiffs had been arrested would immediately conclude that the article in Navyug undoubtedly referred to the plaintiffs. I do not think it matters very much how the public came to know that the plaintiffs had been arrested. It was not just a rumour, it was a fact that they had been arrested. The article appeared shortly after they had been arrested, and anyone with a modicum of common-sense reading this article would immediately conclude, and would have good grounds for doing so, that it referred to the plaintiffs, particularly as some of them were engaged in passport and immigration work.

I find therefore that this article does undoubtedly constitute a libel upon the plaintiffs and it only remains for me to assess the damages.

At the time of the publication of the libel about 900 copies of this newspaper were being sold per week. In addition I have no doubt that copies were being circulated among persons who had not bought the newspaper. The newspaper itself boasts that it is "East Africa's largest circulated Gujarati Paper". The libel must have been widely disseminated in Uganda.

The defence raised is what is known as the rolled up plea. There is hardly any comment in the article and no attempt has been made to show that the facts alleged are true.

The plaintiffs have produced evidence to show that they have suffered in their character and reputation and those who were engaged in passport and immigration work suffered financially as well.

Mr. J. S. Shah is a professional man, an advocate of the Uganda bar, well known in professional circles. In addition he was prominent in political and social activities.

Mr. G. O. Kotecha would appear to be one of the leaders of the Lohana community to which he

belongs – and took a prominent part in its social activities. He was a member of the Kampala City Council, being an alderman.

The other plaintiffs in this case would appear to be respectable members of the Gujarati-speaking Asian community in Kampala, none of them with any political pretensions, ranking socially and in the work they did below J. S. Shah and G. O. Kotecha.

I take into account that they were accused of having taken part in illegal practices, if not in indulging, in crime. Bearing in mind damages awarded in similar libel cases in Uganda and elsewhere in East Africa I would award damages as follows: to J. S. Shah and G. O. Kotecha the sum of Shs. 30,000/-, and to each of the other plaintiffs the sum of Shs. 20,000/- with interest and costs.

Judgment for the plaintiffs.

For the plaintiffs:

P. J. Wilkinson, Q.C. and V. N. Ponda (instructed by *Mrs. H. P. Varia*, Kampala)

For the defendant:

O. J. Keeble (instructed by *Hunter & Greig*, Kampala)

Uganda v Dalal
[1970] 1 EA 355 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	13 December 1969
Case Number:	730/1969 (62/70)
Before:	Mukasa Ag J
Sourced by:	LawAfrica

[1] Appeal – Revision – Order that a charge duplex – Not a final order – No right to revision – Criminal Procedure Code, s. 341 (U.).

Editor's Summary

A magistrate Grade I made an order that the particulars of a count relating to a charge was bad for duplicity. On 27 October 1969, an adjournment was allowed until further in the day in order to have the count amended. A further adjournment was allowed when the Prosecution said he wanted more time in order to amend. On 5 November 1969, the prosecutor applied for an adjournment on the grounds that an application was being made to the High Court of Uganda under s. 341 (1)(b) of the Criminal Procedure Code for a revision of the order.

Held – the magistrate's order was not a final order and therefore no revision was permissible.

Petition for revision dismissed.

No cases referred to in judgment.

Judgment

Mukasa Ag J: This matter came before me by way of Petition for Revision under s. 341 of the Criminal Procedure Code.

Let me set out the facts leading to it briefly:

On 25 August 1969, the Prosecution applied for a Criminal summons to issue in respect of two accused persons, namely Mr. S. H. Dalal and Mr. Sat Paul Singh. They were being charged with failing to appear and produce documents when requested to do so as provided for under s. 27A (3) of the Police (Amendment) Act. The summons were returnable on 1 September 1969.

On 1 September 1969, only one accused had been served, and he was Mr.

S. H. Dalal, who appeared with his advocate and pleaded not guilty to the charge. The charge was fixed for hearing on 27 October 1969.

It seems Mr. Sat Paul Singh was also traced and taken before court on 25 October 1969, when he too was charged. He also pleaded not guilty. On 27 October 1969 the Prosecution put in an amended charge, which contains two counts as follows:

- Count 1. Failure to attend before a Police Officer contrary to s. 27A (3) (a) of the Police Act.
- Count 2. Refusal to produce Documents before a Police Officer contrary to s. 27A (3) (d) of the Police Act.

The prosecution withdrew both counts in respect of the second accused, Mr. Sat Paul Singh, who was discharged. From that moment Mr. S. H. Dalal now the respondent remained the only accused and I shall be referring to him herein as the accused.

The accused pleaded not guilty to both counts contained in the amended charge. The particulars of count 2 read as follows:

“Sureshchandra Harischandra Dalal on 23 August 1969 between 8.30 a.m. and 9.30 a.m. in Kampala Municipality West Mengo District, having been refused by Detective Senior Superintendent F. Z. Wanyo a Police Officer making investigations into offences, to produce before him documents relevant to offences under investigation, refused to produce the documents as required.”

Before evidence was called the advocate for the accused took objection to the second count on the ground that it was bad for duplicity. The trial magistrate then made a ruling upholding the objection. He further adjourned the hearing until later on in the day to enable the prosecution to amend their charge, but when the hearing was resumed, the Prosecutor informed the Court that amendment was impossible at that short notice as it would require framing twenty or more counts. The hearing was then further adjourned to 5 and 6 November 1969.

When the hearing was resumed on 5 November, the prosecution applied for an adjournment in the following terms:

“I apply for an adjournment. Position is that on better advice I discovered virtually impossible to amend the charge. The Ag. Director of Public Prosecutions has filed an application in High Court for revisional order to reverse this Court’s ruling on the question of duplicity on count 2. It would be better to adjourn whole case to see what the High Court order will be like. . . .”

Hence these proceedings now before me, and to complete the picture let me set out what is contained in the D.P.P’s Petition for Revision itself:

“The acting Director of Public Prosecutions Petitions the High Court of Uganda for an Order in revision under s. 341 (1) (b) of the Criminal Procedure Code setting aside the ruling of the learned Magistrate on 27 October 1969 that the second count on the chargesheet in the above case was bad for duplicity on the ground that the said ruling was erroneous in law and the error is material to the merits of the case.”

All proceedings were thus stayed at the request of the prosecution pending the hearing of this petition for a revision of the trial magistrate’s ruling.

At the hearing of this revision Mr. Korde for the accused submitted a preliminary point which was argued, and this is it:

Has this court power to entertain these proceedings at this stage or not?

Mr. Korde argued that the present proceedings before this court are misconceived by the petitioner for at the moment no revision in this matter lies to this court under s. 341 of the Criminal Procedure Code, as neither conviction nor acquittal has been secured against or by the respondent.

Mr. Korde referred to this Court's Revisional Ruling in Cr. Rev. 81 of 1963 which was on the same matter. The matter was exhaustively dealt with by Jones, J. He urged this Court not to depart from this ruling.

Mr. Mulenga, who appeared for the petitioner, while admitting that the criminal charge was still pending before the trial magistrate, argued that the magistrate's ruling made it impossible for the prosecution, so to say, to proceed with the charge under count 2. As far as the prosecution is concerned this was a final order, although the trial magistrate called it a ruling. Therefore an appeal lies to this court by way of Petition for Revision.

Finally Mr. Korde concluded by submitting that as the trial was only one, but on two counts, even if the Ruling on Count 2 were to be held "a final order" which he disputes of course, nevertheless the present Petition is misconceived, for it cannot be made until even the other count 1 is finally disposed of (or a final order in respect of it is made).

If this Petition could be brought at all, it would have to be brought under s. 341 (1) (b) as the D.P.P. mentioned in his petition.

Section s. 341 (1) (b) reads as follows:

"... when it appears that in such proceedings an error material to the merits of any case or involving a miscarriage of justice has occurred, the High Court may (a).....

(b) In the case of any other Order, other than an order of acquittal, alter or reverse such order."

As things stand at the moment the Magistrate's ruling is not a final Order. He will have to say something about Count 2 later on in his trial if the opportunity to amend it which he afforded to the prosecution is not utilised. It seems the petitioner is only anticipating what the magistrate will do then.

It is obvious, as Jones, J., remarked in Cr. Rev. 81/63, *Geresomu Musoke v. Uganda* (unreported), on reading ss. 339 to 341 of the Criminal Procedure Code only a final order can be the subject of a revisional order of this court. At the moment no such order is on the lower court's record. If this were not the case all sorts of magistrates' rulings would be finding their way to this court and I can well imagine a clever accused who likes to avoid a prosecution to conviction delaying such prosecution by making a series of objections, on which a trial magistrate would be compelled to rule and thereafter appeal to this court time and again.

I agree entirely with Mr. Korde that these proceedings now before this court are misconceived. The trial in the Court below should continue and in the event of the prosecution's being dissatisfied with the final decision of that court, this present ground could form part of the grounds of appeal.

This petition is therefore incompetent. It follows then that it is unnecessary for me to go into the

merits.

The Petition is dismissed.

For the appellant:

J. N. Mulenga (Senior State Attorney)

For the respondent:

A. K. Korde (instructed by *Korde & Esmail*, Kampala)

Mohamed v Sardar

[1970] 1 EA 358 (HCK)

Division: High Court of Kenya at Nairobi
Date of judgment: 25 July 1969
Case Number: 2376/1960 (65/70)
Before: Chanan Singh J
Sourced by: LawAfrica

[1] *Limitation of actions – Decree – Execution of – Time Limit for – Limitation Act 1934, s. 3; Limitation of Actions Act 1968, s. 4; Interpretation and General Provisions Act (Cap. 2) (K.).*

Editor's Summary

The applicant applied to execute a decree made in July 1962 on which no application for execution was made until July 1969. It was contended for the respondent that the application had been barred by the Indian Limitation Act 1877, Art. 179 before the coming into force of the Limitation of Actions Act 1968, on 1 December 1967.

Held –

- (i) the time limit for bringing an action on a judgment was 12 years under the Limitation Act 1934, s. 4;
- (ii) action is defined in the Interpretation and General Provisions Act (Cap. 2) to include both originating and ancillary or interlocutory proceedings;
- (iii) the time limit for the execution of a judgment is 12 years, and there is no longer any distinction between first and subsequent applications.

Execution allowed.

Cases referred to in judgment:

- (1) *De Souza v. Thika Cash Stores* (1932), 14 K.L.R. 56.

(2) *William Sandover & Co. v. K. P. Toprani*, 3 E.A.L.J. 85.

Judgment

Chanan Singh J: This is an application for the execution of a decree by the committal of the judgment-debtor to civil prison in default of payment. The judgment-debtor has been brought before me on a warrant of arrest. Mr. M. T. A. Malik, for her, has raised a preliminary point as to the competency of the application. He says that because an application for execution was not made within three years of the date of the decree it cannot now be made at all. He bases this argument on art. 179 of the Indian Limitation Act which, he says, applied to Kenya until 1 December 1967 when the Limitation of Actions Act 1968, came into force.

A decree in this case was made on 2 July 1962, but no application for execution was made until 1 July 1969. Article 179 prescribed three years as the period for applying for execution.

The argument is attractive but as Mr. Satish Gautama, for the judgment creditor, points out, it has not been put forward in these courts for the first time. The large number of authorities on this subject were reviewed by Rudd, J., in *William Sandover & Co. v. K. P. Toprani*, 3 E.A.L.J. 85, and I will not repeat what he said in his comprehensive review. It will perhaps be helpful, however, if I summarise the legal position as it has existed in Kenya.

- (1) Pre-1924. The law of Civil Procedure as well as limitation applicable in Kenya was contained in two Indian statutes, namely the Indian Code of Civil Procedure 1882, and the Indian Limitation Act 1877. The provisions in these

governing the issue raised by Mr. Malik were (omitting words not relevant to the issue) as follows:

Article 179 of 1877 Act: “For the execution of a decree . . . of any Civil Court not provided for by No. 180 or by the Code of Civil Procedure, s. 230, three years . . .”.

Section 230 of 1882 Act: “Where an application to execute a decree for the payment of money . . . has been made under this section and granted, no subsequent application to execute the same shall be granted after the expiration of twelve years from any of the following dates, namely: (a) the date of the decree sought to be enforced or (b) where the decree or any subsequent order directs any payment of money . . . the date of the default in making the payment . . .”.

This meant that art. 179 applied only if art. 180 (with which we are not here concerned) and s. 230 did not apply. Section 230 applied only where an application for execution had already been made and granted, so that a first application would have to be made within three years. If this were granted, then s. 230 would come into play and further applications would not be entertained “after the expiration of twelve years” from the dates specified.

- (2) 1924-1934. In 1924, Kenya enacted its own Civil Procedure Ordinance (now Act). Article 179 of the Indian Limitation Act continued to apply and the new Ordinance contained s. 35 which in all essentials was the same as s. 230 of the repealed Indian Civil Procedure Code but differed in one respect in that it was no longer necessary that an application for execution should have been “made . . . and granted”: it was sufficient if an application had just been made.

The effect of the change was this. Once an application for execution had been made within the three year period laid down in art. 179, that article ceased to apply and the matter was governed solely by s. 35. (*De Souza v. Thika Cash Stores*, 14 K.L.R. 56) (3) 1934-1967. In 1934, Kenya’s Limitation Ordinance was enacted. It contained the following saving clause:

“41. The Indian Limitation Act 1877, as applied to the Colony save in so far as it relates to prescription is hereby repealed:

“Provided that where in the said Indian Limitation Act any act, matter or thing is required to be done within a specified period and a period of limitation in respect of any such act, matter or thing is not provided for in this Ordinance or in any other law or Ordinance now or hereafter in force in the Colony, then notwithstanding the provisions of this section the period of limitation provided for in the said Indian Limitation Act in respect of the said act, matter or thing shall remain in full force and effect.”

Rudd, J., held in the *Sandover* case (*supra*) that a period of limitation for the execution of a decree was “provided for in this Ordinance” (that is, in the Limitation Act 1934) and also in “other law or Ordinance” within the meaning of s. 41. There was, therefore, no need to resort to art. 179 of the Indian Limitation Act. He said this: “In my opinion s. 35 of the Civil Procedure Act is clearly a section which provides a period of limitation for the execution of a decree in the circumstances to which it refers, that is where there has been a previous application for execution.” This conclusion does not help us in the present case because there has been no previous application for execution, and, indeed, as the judge points out, the “section does not provide any period of limitation in respect of the first application for execution after judgment”.

The other provision of law to which the judge referred was s. 3 of the Limitation Act 1934, which stated (omitting words not relevant here): “All suits or

proceedings brought to recover any sum of money secured by any . . . judgment . . . shall and may be brought at any time within twelve years next after a present right to receive . . . shall have accrued to some person capable of giving a discharge . . . and not after twelve years . . .”. This would cover first applications for executions.

He concluded that whether the execution proceedings in a particular case were covered by s. 35 of the Civil Procedure Act or by s. 3 of the Limitation Act, “Article 179 must be held to have been repealed”.

I respectfully agree with that conclusion and hold that, if the Limitation of Actions Act 1968, had not been enacted, the present application would not be time-barred: it would be saved by s. 3. Therefore, Mr. Malik’s argument that the 1968 Act cannot revive time-barred remedies has no application in the present case.

- (4) From 1 December 1967. This is the date on which the Limitation of Actions Act 1968, came into force. It repealed s. 35 of the Civil Procedure Act, the whole of the Limitation Act of 1934, and whatever was left of the Indian Limitation Act of 1877. Section 44 of it says that the new Act does not revive the causes of action that were time-barred before the commencement of it. It also states in s. 45 that if in any matter the period of limitation has not expired, it would run its course and might be replaced by the period provided for by the new Act if longer. These two sections do not bar the application.

One other provision of the 1968 Act that is relevant to the issue before me is sub-s. (4) of s. 4, the relevant part which reads:

“An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered . . .”.

The word “action” is not defined in this Act but the definition in the Interpretation and General Provisions Act (Cap. 2) is:

“ ‘Action’ means any civil proceedings in a court and includes any suit as defined in s. 2 of the Civil Procedure Act.”

The word “action” thus covers both originating proceedings as well as ancillary or interlocutory proceedings. I hold, therefore, that the limitation period for applications for execution under the 1968 Act continues to be twelve years and there is no longer any distinction between the first and the subsequent applications. The present application is well within time.

Execution allowed.

For the applicant:

S. C. Gautama

For the respondent:

M. T. A. Malik (instructed by *A. H. Malik & Co.*, Nairobi)

Gatanga Coffee Growers Co-Operative Society Ltd v Gitau
[1970] 1 EA 361 (HCK)

Division: High Court of Kenya at Nairobi

Date of judgment: 11 February 1970
Case Number: 135/1967 (66/70)
Before: Harris J and Simpson J
Sourced by: LawAfrica

[1] *Co-operative Societies – Arbitration – What are disputes touching the business of the society – Co-operative Societies Act (Cap. 490), s. 80 (K.).*

Editor's Summary

The respondent sued the appellant society of which he was a member in the resident magistrate's court for money due to him in respect of coffee sold by him to the appellant. The appellant pleaded that the court had no jurisdiction to try the case and after this plea had been overruled and judgment given against it, the appellant appealed.

Held –

- (i) there was a dispute between a member and the co-operative society;
- (ii) “business of the society” is not confined to the internal management of the society but covers every activity of the society within the ambit of its by-laws and rules (*Wakiro and Another v. Committee of Bugisu Co-operative Union* (2) followed; *Republic v. The Commission for Co-operative Development ex p. Kabuthi and Others* (3) not followed);
- (iii) accordingly the dispute concerned the business of the society.

Appeal allowed.

Cases referred to in judgment:

- (1) *Benjamin Kavoloto v. Lukenya Ranching and Farming Co-operative Society Ltd.*, Nairobi H.C.C.C. No. 931 of 1966 (unreported).
- (2) *Wakiro and Another v. Committee of Bugisu Co-operative Union*, [1968] E.A. 523.
- (3) *Republic v. The Commissioner for Co-operative Development ex p. Kabuthi and Others*, [1969] E.A. 168.

Judgment

Simpson J: The appellant, the Gatanga Coffee Growers Co-operative Society Limited, deducted from sums due to the respondent, a member of the society, in respect of coffee sold and delivered to it by him the sum of Shs. 2,186/07 being one-half of a deficiency in the society's funds for which it held the respondent and his successor in the office of treasurer to be responsible.

The respondent sued the society for this amount in the Resident Magistrate's Court in Nairobi being simply a claim for the balance due in respect of coffee sold and delivered by him to the appellant.

The society pleaded lack of jurisdiction and this was argued as a preliminary point. Having decided this against the society the magistrate proceeded to give judgment for the respondent.

It is against this judgment that the appellant now appeals solely on the grounds of jurisdiction and relying on the provisions of s. 80 (1) and (2) of the Co-operative Societies Act (Cap. 490) which read as follows:

“80(1) If any dispute concerning the business of registered society arises –

- (a) among members, past members and persons claiming through members, past members and deceased members; and
 - (b) between members, past members or deceased members, and the society, its committee or any officer of the society; or
 - (c) between the society or its committee and any other registered society, it shall be referred to the Commissioner.
- (2) A claim by a registered society for any debt or demand due to it from a member or past member, or from the nominee or personal representative of a deceased member, whether such debt or demand is admitted or not, is a dispute for the purposes of this section.”

Subsequent subsections contain provisions directing the Commissioner to refer disputes of whose existence he is satisfied to arbitration with a right of appeal to him, for enforcement of an award as if it were a decree of the court and for showing cause why judgment should not be entered.

The magistrate based his decision on the form of the pleadings. In its defence the appellant had denied liability on the ground that it had rightly set off against his claim the loss for which it held the respondent responsible. The magistrate held that as this loss could not be pleaded by way of set-off there was no defence on the pleadings to the plaintiff’s claim. If there was no defence there was no dispute. If there was no dispute s. 80 was not applicable.

I think with respect that the magistrate misdirected himself. The validity or otherwise of the defence can hardly be material to the question whether or not a dispute exists. Moreover he appears to have overlooked the fact that the defence included a denial that any balance was due by the society.

On behalf of the respondent it was strongly contended that there was no dispute within the meaning of s. 80 of the Co-operative Societies Act.

As I understand counsel his contention was that if a plaintiff claims a sum of money and the defendant admits the facts giving rise to the claim there is no dispute even though the defendant files a defence denying liability.

There may be no dispute as to the facts on which the claim is based but clearly there is a dispute as to liability to pay.

The word “dispute” is not defined in the Act. It is not a technical term and must be given its ordinary, natural meaning.

In this case the plaintiff claims Shs. 2,186/07 “being the balance due in respect of coffee sold and delivered to the defendant company by the plaintiff at the defendant company’s request and on its behalf” and states:

“Despite demand and the plaintiff’s written intimation of his intention to sue in default of payment the defendant company refuses and/or neglects to pay.”

The mere filing of this plaint raises an inference that there is a dispute between the plaintiff and the society. It is hardly likely that the society is a consenting but impecunious debtor against whom the plaintiff is seeking to obtain a judgment.

I am not however restricted to an examination of the plaint. It is conceded that the whole of the pleadings may be looked at.

In its statement of defence the society states:

“ . . . the committee of the Defendant society after investigation found the

Plaintiff liable for Shs. 2,186/07 and which sum the Defendant Society deducted as a set-off . . . from the price of the coffee sold and delivered by the Plaintiff to the Defendant Society and which sum is claimed by the Plaintiff in para. 1 of the Plaint and in the premises the Defendant Society denies its liability to the Plaintiff in the sum of Shs. 2,186/07 as claimed in the first paragraph of the Plaint or in any sum at all.”

Although by implication it is admitted that Shs. 2,186/07 was due to the plaintiff by the Society liability to pay this sum is denied. Whether or not the defence is a valid one there is clearly a dispute.

Two requirements are necessary to satisfy the provisions of s. 80 (1) of the Co-operative Societies Act.

The dispute must be

- (a) one concerning the business of the society; and
- (b) between the persons specified in para. (a), para. (b) or para. (c) of sub-s. (1).

For the respondent it was contended that the “business of the society” must mean the internal management of the society.

I can see no justification for adopting so restricted an interpretation. In *Wakiro and Another v. Committee of Bugisu Co-operative Union*, [1968] E.A. 523 at p. 527 Russell, J., considered this expression:

“It appears, however, to be generally accepted,” he said, “that even though the words must be strictly construed as s. 68 of the Act ousts the jurisdiction of the courts the word ‘disputes’ includes all matters which could form the subject of civil litigation and ‘touching the business of the society’ is not confined to disputes regarding the internal management of the affairs of the society or disputes in regard to the principles which would regulate the conduct of business.”

“Section 68 of the Act” refers to s. 68 of the Co-operative Societies Act (Cap. 93) of Uganda, sub-s. (1) and (2) of which are substantially the same as sub-s. (1) and (2) of s. 80 of the Kenya Act.

The expression “business of the society” in my opinion covers every activity of the society within the ambit of its by-laws and rules.

According to by-law 3 the objects of the Gatanga Coffee Growers Co-operative Society include the disposal of coffee produced by members in the most profitable manner.

Under by-law 6 only bona fide licensed coffee growers owning coffee trees within the area of operations of the society are eligible for member ship.

By-law 39 (c) enables the Committee to make rules prescribing the conditions on which coffee shall be accepted from members and the times and places at which delivery shall be made.

By-law 40 reads as follows:

“40. No member shall without the written consent of the committee, sell or otherwise dispose of any of his coffee to any company, society or person other than the Society, or an authorised agent of the Society.

Any member who infringes this by-law shall pay into the Reserve Fund of the Society a fine not exceeding 50 per cent of the value, as estimated by the Committee, of the produce so disposed of.”

It is apparent that members must be coffee producers and must deliver their

produce to the society which in its turn disposes of the coffee in the most profitable manner. It follows I think that the business of the society includes the purchase of coffee from members and payment therefor.

The dispute in question is one concerning the business of the society.

It was accepted by counsel for the appellant that “member” in the context of sub-s. (1) means a member in his capacity as member.

This was the opinion of Mosdell, J., in the unreported case of *Benjamin Kavoloto v. Lukenya Ranching and Farming Co-operative Society Ltd.* (Nairobi High Court Civil Case No. 931 of 1966) in which he held that the plaintiff was suing not as a member but as an ex-employee and his status of member was merely coincidental.

A similar view was taken by Trevelyan, J., in *Republic v. The Commissioner for Co-operative Development ex p. Kabuthi and Others*, [1969] E.A. 168.

For the purposes of the present case it is unnecessary to consider whether this interpretation may perhaps be unduly restrictive.

The respondent is a member of the appellant society. As such he was bound to sell his coffee to the society. The transactions giving rise to the dispute were carried out by him in compliance with the by-laws of the society in his capacity as member. The dispute was therefore in my opinion between a member in his capacity as member and the society thus falling within para. (b) of sub-s. (1) of s. 80.

It is I think immaterial that the appellant did not specifically sue the respondent as a member. It is immaterial also that since the society is apparently not debarred from buying coffee from non-members the membership of the respondent was not, so far as the society was concerned, an essential element in the transaction.

I take the foregoing view notwithstanding the provisions of s. 80 (2). Counsel for the respondent submitted that on reading sub-s. (2) together with sub-s. (1) debts and demands were by implication not disputes within the meaning of sub-s. (1). In support of this submission he referred us to the judgment of Trevelyan, J., in *Republic v. The Commissioner for Co-operative Development ex p. Kabuthi and Others*, [1969] E.A. 168, to which I have already referred.

In the course of this judgment (at p. 171) the judge says:

“Moreover, by s. 80 (2) a claim by a society for a debt or demand due to it from a member or past member etc. is declared to be a dispute. This, I think, goes to show that (save as provided for) debts and demands due are not disputes within the Act.”

He concluded that a dispute in respect of dues for coffee being in respect of a debt or demand was not a dispute within the meaning of the Act.

I regret that I find myself unable to agree with this view.

If all debts and demands due to members by a society are to be excluded by implication the effect would be to remove from the ambit of s. 80 (1) not only claims for coffee sold and delivered but also claims for dividends, bonuses, interest and deposits held by the society which I feel could not have been the intention of the legislature.

Full weight must I think be given to the words “whether such debt or demand is admitted or not”.

The Co-operative Societies Act has its source in Indian legislation.

Calvert in The Law and Principles of Co-operation (5th Edn.) at p. 302

makes the comment that in Bengal and Burma it was held that a debtor had only to admit the debt and it ceased to be a dispute.

None of the Indian legislation in question is available here but it would appear according to Calvert that for the removal of doubt or by way of illustration some states inserted a provision similar to sub-s. (2) of s. 80.

I am of the opinion that the main if not the sole object of the legislature in adding sub-s. (2) was the removal of any doubts which might be thought to exist that claims by a registered society for a debt or demand admitted by a member were disputes within the meaning of sub-s. (1).

It was apparently considered unnecessary to make similar provision for the benefit of members in respect of debts or demands admitted by the society.

A dispute within the meaning of sub-s. (1) includes a claim for an unadmitted debt or demand and sub-s. (2) must be read not as restricting the meaning of sub-s. (1) but as extending it to include claims for admitted debts and demands due by a member to a society.

A final submission by counsel for the respondent that if s. 80 ousts the jurisdiction of the court it is ultra vires the Constitution appeared to be an afterthought and was unsupported by argument. I do not feel called upon to adjudicate upon it. The section of the Constitution referred to, s. 60, deals with the jurisdiction of the High Court. We are here concerned with the jurisdiction of a subordinate court.

The appeal is allowed with costs in this court to be taxed on the higher scale and in the court below. The court below having had no jurisdiction to try the suit its judgment is set aside and the suit is dismissed.

Harris J: I agree that, for the reasons given in the judgment which has just been delivered, this appeal should be allowed, but as we are differing, not only from the decision of the court below but also from the view expressed by this court in *R. v. Commissioner for Co-operative Development ex p. Kabuthi and Others*, [1969] E.A. 168, at p. 171, I feel that I should state shortly my opinion in my own words.

The substantial issue for determination is as to the meaning of the expression “any dispute concerning the business” of a registered society in s. 80 (1) of the Co-operative Societies Act. The appellant society, which was the defendant in the lower court, relies upon the provisions of this section in support of its contention that the magistrate had no jurisdiction to entertain the claim and that the suit should have been dismissed. For the respondent it is argued that the expression in question means a dispute of a purely domestic character between a registered society and one of its members in which the fact of his membership is material, and that a claim by a member against his society which can be asserted without his necessarily establishing his membership, as in the present case, does not fall within the section.

Considering in the first place the word “dispute” as so used, the construction put forward by the respondent is, in my view, in conflict with the manifest intention of the subsection. Although we are not concerned here with para. (c) of the subsection, it is clear that, at least prima facie, whatever meaning is to be given to the word “dispute” for the purpose of the subsection as a whole must accord with the terms of each of the three paras. (a), (b) and (c). Paragraph (c) has no application to members as such, with the result that, in its reference to disputes concerning the business of the society, the subsection, it seems to me, should not be construed as contemplating only disputes involving members. Likewise, as to the suggested domestic character which it is said must attach to a dispute to permit it being brought within s. 80, I can see no reason for

ascribing to the word “dispute”, which is not defined in the Act and is not a term of art, a meaning in any way less general than it receives in current usage, which is certainly wide enough to embrace a controversy such as that existing in this case.

Turning to the word “business”, which also is undefined, the appellant society by its by-laws includes among its objects the processing and marketing of coffee produced by its members. The respondent is a member of the society and his claim is for the recovery of money stated to be due to him by the society for coffee sold and delivered to it but for which he says in his plaint the society has refused to pay. The dispute, then, is as to the legal liability of the society to meet this claim and therefore, on its face, is clearly one concerning the carrying on by the society of one of the facets of the very business authorised by its by-laws.

It is contended for the respondent, however, that this is not enough to bring the case within s. 80 and that the society must show that the respondent’s claim is made by him specifically in his capacity of member. I do not think that this contention is correct. In my opinion a person who, having applied for and accepted membership of a society registered under the Act, which is a purely voluntary exercise on his part, subsequently in enjoyment of his rights and in compliance with his obligations as a member concludes a sale of his agricultural produce to the society and later raises a claim against the society for the recovery of monies alleged to be due in respect of that sale, cannot be permitted to shed or waive his status of member at will in order to deprive the society of the protection expressly conferred upon it by s. 80 in relation to the determination of such claim. That he should not be so permitted seems to me to be implicit in the language of the section whereby each reference to “members” is made to include past and deceased members.

The respondent relies also to some extent upon the terms of sub-s. (2) of s. 80 as supporting by inference his submissions in regard to sub-s. (1). I do not think that the language of sub-s. (2) bears the implication which he suggests, and its impact on sub-s. (1) is very limited. Thus it can never apply to a claim falling within either para. (a) or para. (c) of sub-s. (1) and it relates only to claims within para. (b) which are put forward by a registered society itself (and even then not to all such claims) but not to claims within that paragraph which are raised against a society.

For these reasons I am of the opinion that the appellant society is entitled to the protection of the section, that the court below had no jurisdiction to entertain the suit, and that the appeal must succeed.

The order of this court will be in the terms indicated in the judgment of Simpson, J.

Appeal allowed.

For the appellant:

P. E. Nowrojee (instructed by *Nowrojee & Nowrojee*, Nairobi)

For the respondent:

D. N. Khanna (instructed by *Khanna & Co.*, Nairobi)

Division: Court of Appeal at Nairobi
Date of judgment: 18 December 1969
Case Number: 39/1969 (25/70)
Before: Sir Charles Newbold P, Duffus VP and Spry JA
Sourced by: LawAfrica

[1] *Damages – Passing off – Deliberate wrong for profit – Exemplary damages.*

[2] *Damages – Exemplary – Deliberate wrong for profit – Exemplary damages may be awarded.*

[3] *Passing off – Device – Confusion – Average customer acting reasonably likely to be confused.*

Editor’s Summary

The High Court awarded damages to the respondent for passing off, finding that the appellant had marketed his baking powder in a get up likely to be confused with the respondent’s. On appeal the appellant argued that the respondent’s witnesses were trap witnesses and secondly that the damages awarded were excessive.

Held –

- (i) the test is whether an average customer acting with reasonable care would be likely to be confused by the article complained of;
- (ii) on the judge’s finding the appellant deliberately committed a wrong in order to benefit himself ‘the judge was entitled to award damages in excess of the loss suffered;
- (iii) in view of the lack of evidence of loss of profits the damages awarded would be reduced.

Appeal allowed in part. Judgment of the High Court of Kenya (sub nom *P.J. Products Ltd. v. Haria Industries*, [1970] E.A. 49) varied.

No cases referred to in judgment.

Judgment

Sir Charles Newbold P: This is an appeal against a decision of the High Court awarding damages to the plaintiff in a passing-off action and granting a permanent injunction against the defendant from putting on the market any baking powder in packets which bore a reasonable resemblance to the plaintiff’s baking powder packets with the consequence that they were likely to be confused with the plaintiff’s baking powder.

The facts very briefly are that the plaintiff started producing his baking powder in 1/4lb packets in 1961 and at that time the packet and the manner of presentation were very different from that of any other baking powder on the market. His business prospered and, on the figure given, in every year he sold an increasing amount of baking powder. In the middle of 1968 the defendant put on to the market baking powder in similar 1/4lb packets with a “get-up” which the plaintiff says led to a confusion between the

plaintiff's baking powder and the defendant's baking powder. Certainly the "get-up" is very similar. The colour scheme is precisely the same and there are bands of blue colour in almost identical positions and of almost identical size and the feature picture in both of these cartons is a chef. I should say here that the figure of the chef in each case is clearly different; and the figure of the chef on the defendant's packet is clearly derived from the

figure of the chef on the curry powder packet which the defendant had earlier marketed. The plaintiff started marketing this baking powder when the defendant marketed only curry powder. There is also evidence that in 1968, when the defendant started to market its baking powder in packets of which the plaintiff complains, two other companies also started marketing baking powder.

Now the trial judge, having heard the evidence said this ([1970] E.A. 531):

“I accept the evidence of Mr. Ngondi, Mr. Njoroge and Mr. Eckhart and I find that by reason of sales promotions and sales between the years 1963 and 1968 the plaintiffs label had become established in the market. I am satisfied that the ‘get-up’ of the defendants label is so similar to that of the plaintiffs as to lead to confusion and to allow of deception, that customers having become used to the plaintiffs product in the ‘get-up’ of their packet, asking for baking powder and being given the defendants product would think they had the same product as before, that is the plaintiffs product, . . .”

Then later on, having held that the plaintiff succeeded he assessed the damages at a figure of £2,125. From that decision the defendant has appealed on two grounds.

First, he alleges that in fact the packet made by the defendant was not likely to cause confusion with that of the plaintiff, and, secondly, he complains that the damages awarded are unreasonably high and bear no relation to any loss of profit or any other factor shown in the evidence.

As far as the first aspect of the appeal is concerned, that is whether in fact the package used by the defendant was a colourable imitation of that used by the plaintiff, I am quite satisfied that the plaintiff has made out his case and that the trial judge was very right indeed in coming to the conclusion that he did. Mr. Gautama has made a valiant effort to satisfy us to the contrary. He has submitted, rightly I think, that the plaintiff’s witnesses were trap witnesses and that their evidence ought to be examined with great caution. I accept that. But the test in determining whether or not the defendant had put upon the market an article which would be likely to deceive is whether an average customer, without any precise recollection of the article that he wants but acting with reasonable care, would, if he saw the article complained of, be likely to be confused. Now we have before us the two articles in question. I have no doubt whatsoever that any reasonable consumer acting with a reasonable amount of care would be confused by these two packets, the “get-up” of which, in broad outline, is such as to lead to the greatest possible confusion. It is true that there are a large number of differences and if one examined these articles closely no literate person would be likely to be deceived. But I am satisfied from an examination of these two packets that even a literate person, going into a shop and asking for baking powder and intending to get P.J. Powder, would, without any negligence on his part be confused, if in fact there was handed to him the Haria powder. Therefore it seems to me that it is immaterial how carefully or otherwise one examines the evidence of the witnesses because the determination of the matter is one for the court. The trial judge came to that conclusion and for my part I come entirely to the same conclusion. For that reason, at the close of Mr. Gautama’s address to us on this aspect of the appeal, we stated that we did not wish to hear Mr. Morrison. It is for these reasons that I for my part consider that the first ground of appeal must fail.

To turn now to the second ground of appeal, which relates to the damages. The law is, and it has been laid down very clearly by this Court, that in all cases of *tort* a plaintiff who succeeds in proving that he has suffered loss is entitled only to such damages as would compensate him for that loss. If the damages are claimed in the form of special damages, then they must be pleaded and proved. If they are claimed in the form of general damages, then of course,

evidence of precise loss has not got to be led. Now this general rule is subject to two exceptions. One of those exceptions is that a plaintiff may become entitled to pecuniary damages in excess of the actual amount that he has suffered where the action complained of – the *tort* committed by the defendant – was committed deliberately with a view to making a profit out of his action. That is the law. On the facts found by the trial judge, and I think on the necessary inference which I draw from the nature of the “get-up”, this “get-up” chosen by the defendant was chosen deliberately; and he could only have done so with a view deliberately to commit a wrong in order to benefit himself. Therefore I have come to the conclusion that this is a case in which, in addition to purely compensatory damages, the court might well add an element to show its displeasure of the act of the defendant.

Now, where a plaintiff claims general damages, while he does not have to prove the specific amount lost, nevertheless if he does not lead some evidence which would assist the court he has no-one but himself to blame if the amount actually awarded by the court is not sufficient to compensate him for any loss which he has actually suffered. I might mention that where damages are at large matters can be taken into account for the purposes of compensation other than purely pecuniary loss. One example of that is if the baking powder marketed by the defendant had been of such poor quality that, in addition to any loss of sales by P.J., the whole nature of the Haria product had affected the future sales of P.J. That is an example of a loss other than a pure loss of profit which may be taken into account in arriving at the compensatory damages. There is absolutely no suggestion to that effect and, indeed, Mr. Morrison said in the course of his address that one baking powder is very much like another baking powder.

Now having set out the principles of law, I ask myself on what basis did the trial judge arrive at this figure of £2,125. Nowhere does he set it out. He merely says ([1970] E.A. 54):

“Accepting Mr. Eckhart’s figures and taking into consideration the circumstances of the case and the conduct of the defendants I assess the damages at £2,125.”

That places us in great difficulty. Mr. Morrison, in the course of his address has said that the plaintiff deliberately withheld his profit figures for commercial reasons. Now this is by no means uncommon and is very understandable, but usually some evidence which would assist the court is led. In this case very little evidence was given which would be of assistance to the court in arriving at the loss the plaintiff has, in fact, suffered. There is, however, in the evidence of Mr. Eckhart, a statement of the sales figures over the years 1963 to 1968 and the breakdown into monthly figures of the sales for the years 1967 and 1968. There is also a statement that in 1968 it was expected that P.J. would sell 7,200 cartons whereas in fact the figures show that only about 5,500 were sold. It is true that there is another figure of 6,000 for prospective sales mentioned, but I think the probability is that this figure – this 6,000 – related to Nairobi alone. Therefore I would seek to arrive at the loss suffered by the plaintiff basing it upon a drop of 1,700 cartons during the course of the year. That is the difference between 7,200 cartons and the 5,500 in fact sold. It is noteworthy that these figures show that almost the entire loss took place in the last half of the year when the Haria product was marketed. There is no evidence, not the remotest, of the profit percentage on any carton but a maximum figure of 25 per cent has been mentioned and I think that it might be possible to work very broadly on that basis. As the gross charge for a carton was 42s. very roughly, on a 25 per cent profit element, that would mean a profit of 10s. on each carton. Thus the 1,700 cartons drop between the estimated sales and the actual sales would result in a

loss of profit of £850. Now not all of this could possibly be attributed to the action of the defendant in putting on the market this baking powder, because as I have said, there were two others which were marketed at the same time and also a certain number of people may well have bought the Haria product no matter what its “get-up”. Thus while I consider that to a large extent the drop in the sales was due to the marketing by Haria of its baking powder in its deceptive “get-up”, nevertheless I do not think that the damage which the plaintiff suffered was £850. I think he suffered less than that. Precisely how much less it is quite impossible to say and it would be a guess on the part of anyone. Having said that, and bearing in mind, as I said earlier, that in my view, and I think clearly in the trial judge’s view, the action of the defendant was deliberate and he sought to make a profit out of his wrong and that therefore this is one of the very few cases in which an amount of damages additional to the purely compensatory can be given, I have come to the conclusion that the proper figure which should be awarded to the plaintiff for the action of the defendant is £750. I would accordingly dismiss the appeal in so far as it relates to the aspect of liability and the removal of the injunction but allow the appeal in so far as it relates to damages and reduce the figure of damages awarded by the trial judge from £2,125 to £750.

Duffus VP: I agree with my lord President.

Spry JA: I also agree.

Appeal allowed in part.

For the appellant:

S. C. Gautama and J. J. Patel (instructed by J. J. Patel & Co., Nairobi)

For the respondent:

A. F. Morrison (instructed by Archer & Wilcock, Nairobi)

Maina v Republic
[1970] 1 EA 370 (HCK)

Division: High Court of Kenya at Nairobi

Date of judgment: 1 December 1969

Case Number: 955/1969 (47/69)

Before: Mwendwa CJ and Madan J

Sourced by: LawAfrica

[1] *Criminal Practice and Procedure – Sentence – Young person – Robbery with violence – Whether minimum prison sentence mandatory – Penal Code (Cap. 63), s. 296 (K.) – Children and Young Persons Act (Cap. 141), s. 16 (K.)*

[2] *Criminal Practice and Procedure – Robbery with violence – Young person – Whether minimum prison sentence mandatory on young person – Penal Code (Cap. 63), s. 296 (K.) – Children and Young*

Persons Act (Cap. 141), s. 16 (K).

[3] Evidence – Sexual cases – Corroboration – Reasons for necessity of.

Editor's Summary

The appellant whose age was estimated at 18 years was convicted of rape and of robbery with violence and on the latter conviction was sentenced to fourteen years' imprisonment. On appeal the conviction of rape was not supported by the prosecution.

The Children and Young Persons Act (Cap. 141), s. 16 (3) (a) provides that no young person shall be ordered to imprisonment unless the court is of the opinion that he cannot be suitably dealt with in any other way permitted by law. By the Penal Code, s. 296, as amended in 1969, the minimum sentence for robbery with violence was made 14 years.

Held –

- (i) As the medical report was consistent with the appellant being under 18, he was a young person for the purposes of the Children and Young Persons Act;

- (ii) the protection of the Children and Young Persons Act could only be taken away by express statutory provision in the clearest language, and the Penal Codes, s. 296, does not do this;
- (iii) for the conviction would be substituted a finding of guilty and an order sending the appellant to a borstal institution for three years.

Observations by the court on the reasons for the danger of convicting on the uncorroborated evidence of the complainant in sexual cases.

Sentence varied.

Cases referred to in judgment:

- (1) *Henry and Manning v. R.*, 53 Cr. App. Rep. 150.

Judgment

Mwendwa CJ: The appellant was convicted on three counts, one of rape contrary to s. 140, and on two counts of robbery with violence contrary to s. 296 (2), of the Penal Code.

The victim in the first and second counts of rape and robbery respectively was Ruth Wamaitha. The third count of robbery related to one Stephen Aloo Joseph.

We are in agreement with the Deputy Public Prosecutor who does not support the convictions on the first two counts and we make an order quashing the same and set aside the sentences in respect thereof.

Before leaving the matter of the first two counts we would state in the hope it will be of use to the magistrate on future occasions, as pointed out by the Court of Appeal in *Henry and Manning v. R.* 53 Cr. App. Rep. 150, it has been said again and again that in cases of alleged sexual offences it is really dangerous to convict on the evidence of the woman or girl alone. It is dangerous because human experience has shown that girls and women do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons and sometimes for no reason at all. In every case of an alleged sexual offence the magistrate should warn himself that he has to look at the particular facts of the particular case and if, having given full weight to the warning, he comes to the conclusion that in the particular case the woman or girl without any real doubt is speaking the truth, then the fact that there is no corroboration need not stop his convicting. Most unfortunately, this was not done in the present case. The magistrate did not direct his mind to the question of corroboration at all. It does not matter whether the issue is consent or no consent or whether the issue is identification or anything else. There is still a duty to use language which in plain terms conveys a warning of the kind described above.

No such warning having been administered in this case and the second count following as it does consequentially out of the same evidence as that adduced in respect of the first count, we think it would be unsafe to allow these two convictions to stand. Accordingly, we have quashed both the convictions and set aside the sentences.

The appellant was sentenced to five years' imprisonment on the first count. For the information of the magistrate he should also have been sentenced to hard labour as compulsorily required by the amending provisions enacted by Act 3 of 1969.

Under the third count the appellant was convicted of robbing Stephen Aloo Joseph of a pair of shoes and of using violence during the course of doing so.

The evidence leaves us in no doubt that the appellant did commit this offence. There is also no doubt about his identification by Stephen Aloo who was holding and struggling with him as his assailant when the police arrived on the scene with a dog. Aloo released him on being ordered to do so by the police and the appellant tried to run away. The police set the dog upon him and he was caught after a chase of only about fifteen yards. One foot of Aloo's pair of shoes was missing; although it was not found upon the appellant's person, he was we think undoubtedly a member of a gang who set upon Aloo to rob him. The appellant was properly convicted and the appeal against conviction is dismissed.

The offence being robbery with violence contrary to the Penal Code, s. 296 (2) the appellant received the minimum sentence of fourteen years' imprisonment with corporal punishment which must be imposed with hard labour (the magistrate omitted hard labour in the sentence passed by him) upon conviction for that offence pursuant to the following provision of s. 296 (2), i.e.:

"If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he is liable to imprisonment with hard labour for a term not less than fourteen and not more than twenty years with corporal punishment."

The magistrate should have made the sentence of imprisonment with hard labour in compliance with the foregoing provisions.

According to the medical report the appellant's age was estimated to be 18 years without any more definite or positive fixation. It may well be more or less. If less than 18, which could well be the case, he was a "young person" within the following definition of that expression set out in s. 2 of the Children and Young Persons Act (Cap. 141):

"'Young person' means a person who is of the age of sixteen years or more and is under the age of eighteen years."

Under s. 16 (3) (a) of the same Act, a young person shall not be ordered to imprisonment unless the court is of the opinion that he cannot be suitably dealt with in any other way permitted by law, and the court shall duly record such opinion and the reason therefor. Under paragraph 3 (b) any order of imprisonment made by virtue of sub-para. (a) shall be subject to confirmation by the High Court, and the offender shall be detained as an unconvicted person pending confirmation and may elect to commence his term of imprisonment forthwith.

The provisions of s. 296 (2) of the Penal Code and s. 16 (3) (a) of the Children and Young Persons Act would seem to be in conflict if an accused person who is of the age of sixteen years or more, and is under the age of eighteen years, is convicted of the offence of robbery with violence. This conflict is further emphasised by the second provision of s. 26 (3) of the Penal Code which reads:

- (ii) Where the law concerned provides for imprisonment together with corporal punishment such person shall be sentenced to imprisonment and to corporal punishment.

It has been argued before us that upon conviction for the offence of robbery with violence contrary to s. 296 (2), the accused person notwithstanding that he is a young person must be sentenced to imprisonment for a term not less than fourteen and not more than twenty years with corporal punishment. In other words the only discretion which the court has is in regard to the term of imprisonment to be imposed ranging from fourteen to twenty years with corporal

punishment; that the provisions of s. 296 (2) having been enacted later they must prevail.

We do not agree. We think the Children and Young Persons Act is an enactment of a special nature with a special purpose. Its provisions are designed for the protection of children, juveniles and young persons. For example, under sub-s. (4) of s. 16 a juvenile or young person ordered to imprisonment shall, where practicable, be confined apart from, and shall not be allowed to associate with, adult prisoners during his term of imprisonment. Under sub-s. (5), where a juvenile is ordered to imprisonment, the warrant of committal shall clearly show that such person is a juvenile or young person, as the case may be. The object no doubt is to prevent contamination of juveniles and young persons by keeping them apart from adult prisoners. In our opinion this kind of expressly created statutory protection could only be taken away by equally express statutory provision in the clearest language. We think neither s. 26 nor s. 296 (2) aim to do this. We venture to express the opinion that the punitive provision in s. 296 (2) is more appropriately applied to others than juveniles and young persons such as, for example, hard-core criminals.

The appellant, therefore, should not be ordered to imprisonment unless we are of the opinion that he cannot be suitably dealt with in any other way permitted by law. We are not of that opinion. We think he can be suitably dealt with in another way which is permitted by law. Section 3 (b) of the Children and Young Persons Act empowers the court to substitute for the conviction a finding of guilty, and to substitute for the sentence an order under s. 17 of that Act. We do so. Under sub-para. (k) of s. 17, after consideration of the matters mentioned in s. 5 of the Borstal Institutions Act (Cap. 91) and under s. 6 (1) being satisfied it is expedient for his reformation that the appellant should undergo a period of training in a borstal institution and, having ascertained under s. 8 that accommodation is available, we direct that the appellant be sent to a borstal institution for a period of three years.

Sentence varied.

For the appellant:

M. T. A. Malik (instructed by *A. H. Malik & Co.*, Nairobi)

For the respondent:

J. R. Hobbs (Deputy Public Prosecutor)

Odongkara v Astles
[1970] 1 EA 374 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	17 December 1969
Case Number:	524/1968 (49/70)
Before:	Phadke Ag J
Sourced by:	LawAfrica

[1] *Damages – Slander – Imputation of treason against police officer – Shs. 5,000/-.* [2] *Defamation – Innuendo – When necessary to plead – Effect.*

[3] *Defamation – Slander – Imputation of treason against police officer made in hearing of a single person – Words defamatory.*

[4] *Defamation – Slander – Actionable per se – Crime – Charge of specific crime not necessary provided plaintiff accused of a crime for which he could suffer imprisonment.*

Editor's Summary

The defendant in the hearing of a single person said that a group of persons including the plaintiff were meeting and that the purpose of the meeting was to work out a plan to cause chaos and to overthrow the Uganda Government. The plaintiff, an Assistant Commissioner of Police, sued the defendant two years later for damages for slander. The plaintiff pleaded by way of innuendo that by the words spoken the defendant meant and was understood to mean that the plaintiff had committed or was planning to commit a criminal offence punishable by imprisonment.

Held –

- (i) the words in question were defamatory of the plaintiff in their natural and ordinary meaning;
- (ii) it was therefore not necessary to decide whether the innuendoes were justified;
- (iii) the implication of the words was that the plaintiff was guilty of treason; and no special damage was necessary to the action;
- (iv) the words made specific reference to the plaintiff and were defamatory of him;
- (v) damages should be assessed at Shs. 5,000/-.

Observations on when an innuendo should be pleaded.

Judgment for the plaintiff for Shs. 5,000/- damages with interest and costs.

Cases referred to in judgment:

- (1) *Shirley v. Fagg* (1675), 6 St. Tr. 1121.
- (2) *R. v. Langhorn* (1679), 7 St. Tr. 418.
- (3) *R. v. Thistlewood* (1820), 33 St. Tr. 681.
- (4) *Simmons v. Mitchell* (1880), 6 A.C. 156.
- (5) *Holdsworth v. Associated Newspapers, Ltd.*, [1937] 3 All E.R. 872.
- (6) *Knupffer v. London Express Newspapers, Ltd.*, [1944] 1 All E.R. 495.
- (7) *Lewis v. Daily Telegraph, Ltd.*, [1963] 2 All E.R. 151.
- (8) *Dr. Arvind A. Kati v. G. L. Elder & Another*, (Uganda H.C.C.C. 437 of 1964) (unreported).

Judgment

Phadke Ag J: The plaintiff is an Assistant Commissioner of Police in the Uganda Police Force. The

defendant is a television

operations manager. The plaintiff's claim against the defendant is for damages for slander, and the particulars of this claim are set out in paras. 3, 4 and 5 of the amended plaintiff, as under:

- "3. On or about 17 December 1966, the defendant falsely and maliciously spoke of the plaintiff to and/or in the presence and hearing of Mr. Otim Oryem:

A group of persons including the plaintiff were then meeting in the Uganda Club, Kampala and that the purpose of the meeting was to work out a plan to cause chaos and to overthrow the Uganda Government.
4. By the said words the defendant meant and was understood to mean that the plaintiff had committed and/or was planning to commit a criminal offence punishable by imprisonment.
5. The plaintiff has in consequence been seriously injured in his character credit and reputation and has been brought into public scandal odium and contempt."

In his written statement of defence, the defendant raised the following defences, in paras. 3 and 4 thereof:

- "3. The defendant denies that he spoke or published any of the words set out in para. 3 of the amended plaintiff either of the plaintiff or to or in the presence or hearing of any of the persons named in para. 3 of the amended plaintiff as alleged or at all.
4. The defendant denies that the said words if spoken (which is denied) bore or were understood to bear any of the meanings alleged in para. 4 of the amended plaintiff or any other meaning defamatory of the plaintiff."

At the commencement of the trial, counsel for both parties stated that the undermentioned matters were agreed between the parties:

- (1) The defendant admitted that he spoke the words complained of, as appearing in para. 3 of the amended plaintiff.
- (2) The defendant admitted that the plaintiff has a good reputation.
- (3) The plaintiff admitted that he had not suffered any special damage.
- (4) No evidence would be called by either party.
- (5) The submissions to be made to the court would be on matters of law only.

The following agreed issues of law were submitted for decision by the court:

1. Whether the innuendoes set out in para. 4 of the plaintiff are justified?
2. Whether the words complained of are actionable per se?
3. Whether the words complained of are defamatory of the plaintiff?

It will be observed that the issues numbered 1 and 3 are closely connected with each other. To deal with them separately would lead to a great deal of repetition, and therefore I will deal with them together.

Mr. Binaisa, counsel for the plaintiff, submitted that the words complained of were defamatory of the plaintiff because they imputed to the plaintiff the commission of a crime – the crime of treason punishable by death under s. 25 of the Penal Code Act, or the crime of a treasonable felony punishable by imprisonment for life under s. 28 of the Penal Code Act. He submitted that it was not necessary to specify in the plaintiff the exact offence and referred to the commentary in *Gatley on Libel and Slander* (6th Edn.), para. 154, at p. 85, which reads:

"The exact offence need not be specified; words involving a general charge

of criminality will suffice, provided they impute some offence for which the plaintiff can be made to suffer corporally by way of punishment.”

Mr. Binaisa argued that the words complained of were prima facie so clearly defamatory of the plaintiff that an innuendo was really not necessary. Nevertheless, the innuendo set out in para. 4 of the plaint correctly stated the inference or implication to be drawn from those words.

Mr. Clerk, counsel for the defendant, submitted that the words complained of did not impute to the plaintiff the commission of a crime, and that no such strained construction should be put upon the words in question. He argued that there was nothing in those words to convey the suggestion that any crime included in the Penal Code Act had been committed by the plaintiff. He submitted that a mere suspicion only of the commission of a crime is not in law sufficient to make a statement defamatory, as was held in *Simmons v. Mitchell* (1880), 6 A.C. 156.

Mr. Clerk further submitted that even if the words complained of were to be construed as being derogatory of a group of persons, they did not contain a specific reference to the plaintiff. He referred to *Knupffer v. London Express Newspapers, Ltd.*, [1944] 1 All E.R. 495, a decision of the House of Lords in England, where it was held that when defamatory words are written or spoken of a class of persons it is not open to a member of that class to say that the words were spoken of him unless there is something to show that the words about the class refer to him as an individual.

Before I examine the respective submissions of both counsel, I consider it desirable to briefly state the law on the subject as I understand it.

A person publishes a slander who speaks words defamatory of another to or in the presence of a third person, and a statement is defamatory of the person of whom it is published if it is calculated to lower him in the estimation of ordinary, just and reasonable men. The test is whether, under the circumstances in which the words were published, reasonable men would be likely to understand them in a defamatory sense. Words are normally to be construed in their natural and ordinary meaning as popularly understood. However, where words prima facie not defamatory are alleged to convey a defamatory imputation by reason of some specific knowledge available to those to whom they were published, or alleged to convey some special meaning or inference to be attached to or drawn from them, as the case may be, it is necessary for the plaintiff to plead an explanatory averment known as an innuendo. When the innuendo is based upon the special knowledge available to those to whom the words are published, it is described as a “true” or “legal” innuendo which gives rise to a cause of action separate from that arising from the words in their ordinary and natural meaning and which has to be proved by extrinsic evidence. On the other hand, when the innuendo is based upon the special meaning or inference or implication to be attached to or drawn from the words complained of, it is described as a “false” innuendo, or “popular” innuendo to use the description preferred by Lord Devlin in *Lewis v. Daily Telegraph, Ltd.*, [1963] 2 All E.R. 151, at p. 170. The “false” or “popular” innuendo does not give rise to a cause of action separate from that arising from the words in their ordinary and natural meaning.

It will be seen from what I have endeavoured to briefly set out above that where the words complained of are prima facie defamatory, an innuendo is strictly unnecessary although it is not unusual to insert it.

Gatley on Libel and Slander (6th Edn.), para. 119, at p. 67, states – “Where the plaintiff has relied on an innuendo meaning, he is entitled to recover if he can satisfy the jury that the words are actionable with or without the innuendo.

If he fails to prove the innuendo he will not necessarily be precluded from succeeding in the action; for he can in such a case, treat his unproved innuendo as surplusage, and contend that the words are defamatory in their natural and ordinary meaning.” Fraser on Libel and Slander (7th Edn.), at p. 18, states – “No innuendo is necessary where the words complained of are defamatory of the plaintiff in their ordinary meaning. If a plaintiff is unable to prove his innuendo, he may rely on the words in their natural and ordinary meaning and succeed on that ground if the words are defamatory”. Scott, L.J., in *Holdsworth v. Associated Newspapers, Ltd.*, [1937] 3 All E.R. 872 at p. 879, approved of these two statements as accurate statements of the law. I respectfully agree.

I must now consider three questions, namely – (1) What is the natural and ordinary meaning to be given to the words complained of? (2) Would such natural and ordinary meaning be defamatory of the plaintiff? and (3) Would such natural and ordinary meaning be incapable of a defamatory meaning without an innuendo?

It has been rightly said that it is in general useless and often misleading to quote authorities to show that particular words have been held in particular cases to be defamatory, as the meaning of particular words may vary with the context and the circumstances in which they are published. The meaning is to be determined on an objective test, that is, by the meaning in which the ordinary reasonable man would understand them. As was said by Lord Reid in *Lewis v. Daily Telegraph, Ltd.*, (*supra*), at p. 154, “the ordinary man does not live in an ivory tower and he is not inhibited by a knowledge of the rules of construction. So he can and does read between the lines in the light of his general knowledge and experience of worldly affairs.”

The question is not what meaning was intended but what reasonable men would understand to be the meaning. The first and foremost meaning to be attached to any words is their literal meaning. Now what is the literal meaning of the words complained of in this suit? They mean that a number of persons, one of whom was the plaintiff, were then (that is, at the time the words were spoken) holding a meeting at the Uganda Club, and that the purpose of the meeting was to prepare a plan which would cause confusion and the overthrow of the Uganda Government. I consider that this is the plain, simple and fair literal meaning to be attributed to the words in question, and I feel satisfied that it is this meaning, and no other, which the ordinary, just and reasonable man would attribute to them.

Would the natural and ordinary meaning, as stated above, be defamatory of the plaintiff? The criterion is the opinion of ordinary, just and reasonable men. I feel no doubt that such men would think of the plaintiff as a man who had violated his allegiance to the Government and engaged in treasonable activity – in short, a traitor. I do not agree with Mr. Clerk that the words complained of be construed as merely derogatory and not defamatory, and I hold that the words in question were defamatory of the plaintiff.

In dealing with the law in an earlier part of this judgment, I have stated that where the words complained of were defamatory in their natural and ordinary meaning, an innuendo is strictly unnecessary, and that even if an innuendo has been pleaded but not proved such an innuendo is surplusage. Having held that the words complained of were defamatory in their natural and ordinary meaning, it is not necessary to decide whether or not the innuendoes in para. 4 of the plaint are justified. However, I will briefly state my view upon Mr. Clerk’s submission that the plaintiff had not adduced any evidence of extrinsic facts to prove the innuendoes. In my opinion, these innuendoes were not “true” or “legal” innuendoes. The contents of para. 4 of the plaint pleaded what are described as “false” or “popular” innuendoes and as such they did not constitute

distinct causes of action separate from the natural and ordinary meaning of the words complained of. Their inclusion has not caused any harm or prejudice to the defendant, and I agree with Mr. Binaisa that they were really not necessary.

The plaintiff having admitted that he had not suffered any special damage, and there being no claim for special damages, Mr. Clerk submitted that this suit is misconceived. It is well established that where spoken words do not fall under certain well defined categories, an action of slander can only be maintained if the plaintiff has suffered special damage. One of these categories is the imputation to the plaintiff of the commission of a crime for which he can be made to suffer physically by way of punishment. In such a case an action can be maintained without proof of special damages. Mr. Clerk argued that the words in question did not indicate that any crime included in the Penal Code Act had been committed, and that at the very most they conveyed a mere suspicion only of the commission of a crime or of the intention or inclination to commit a crime. He referred to *Simmons v. Mitchell* (1880), 6 A.C. 156, in which it was held that a mere suspicion is not enough, and it is correct to say that an intention does not amount to the commission of a crime. I do not agree that these submissions are applicable to the circumstances of this case.

I agree with Mr. Binaisa that the imputation was that the plaintiff was guilty of the offence of treason under s. 25 of the Penal Code Act. The section reads as under:

- “25. Any person who,
- (a) levies war against the Sovereign State of Uganda, or
 - (b) compasses, imagines, invents, devises or intends any act, matter or theory and expresses, utters or declares such compassing, imagining, inventing, devising or intending by any overt act in order by force of arms to overturn the Government as by law established, commits the offence of treason and shall be liable on conviction to suffer death.”

In my opinion, the holding of a meeting for devising the overturn of the Government as by law established amounts to the commission of an “overt act” within the meaning of s. 25. An “overt act” was defined by Alderson, B. as “any act, measure, course, or means whatever done, taken, used, or assented to, for the purpose of effecting a traitorous intention” (*Shirley v. Fagg* (1675), 6 St. Tr. 1121), and by Lord Tenterden as “any act manifesting the criminal intention and tending towards the accomplishment of the criminal object” (*R. v. Thistlewood* (1820), 33 St. Tr. 681); in *R. v. Langhorn* (1679), 7 St. Tr. 418, it was held that a conspiracy, though going no further than the oral conversation, constitutes a sufficient overt act. These cases are referred to in Kenny’s *Outlines of Criminal Law* (19th Edn.), at p. 396.

The words complained of, admittedly spoken by the defendant, make a specific reference to the plaintiff, and not merely to a group of persons. I therefore hold that the decision in *Knupffer v. London Express Newspapers, Ltd.*, (*supra*) cited by Mr. Clerk, is not applicable to the facts of this case.

For the foregoing reasons, my answers to the three agreed issues are as follows:

Issue No. 1 – The innuendoes set out in para. 4 of the plaint are justified.

Issue No. 2 – The words complained of are actionable per se.

Issue No. 3 – The words complained of are defamatory of the plaintiff.

Having held in favour of the plaintiff on all the agreed issues, I find that the plaintiff is entitled to damages from the defendant, and I will now proceed to assess the damages.

In a trial with a jury the assessment of damages is peculiarly the province of the jury. Mr. Binaisa submitted that sitting as both judge and jury I should take into consideration all the circumstances which a jury would do, and he referred to the commentary in Gatley on Libel and Slander (6th Edn.), at p. 600, where it is stated that the jury is entitled to take into consideration the conduct of the plaintiff, his position and standing, the nature of the defamation and the mode and extent of publication. He emphasised that an imputation of a grave crime had been made against the plaintiff, and submitted that the plaintiff who is an Assistant Commissioner of Police and admittedly a man of good reputation be awarded substantial damages.

Mr. Clerk submitted that the words complained of were spoken on 17 December 1966, and the fact that the plaintiff did not institute this suit until 26 November 1968, almost two years later, indicated that the plaintiff himself did not take a serious view of the incident. The publication was to a single individual and therefore to an absolutely minimal audience. There was no suggestion that the plaintiff suffered any detriment in his employment or any other loss. He submitted that this is not a case for awarding substantial damages.

Mr. Clerk referred to the decision of this court in Civil Case No. 437 of 1964 – *Dr. Arvind A. Kati v. G. L. Elder & Another*. That was an action for libel in which the plaintiff complained that the defendants had defamed him by writing a letter to his father alleging that the plaintiff had stolen an ash-tray during his stay at a hotel managed by the defendants. Keatings, J. held that the letter was defamatory but awarded nominal damages of Shs. 5/- only on the grounds that the article in question was of no intrinsic value, that the publication was to the plaintiff's father only, that the defendants had apologised for their error and that the plaintiff had suffered no real damage. Mr. Clerk submitted that the damages be assessed at a sum not exceeding Shs. 500/-.

The facts in the case cited by Mr. Clerk are hardly comparable to the facts of the case before me, and the respective circumstances of the two cases do not show any close resemblance. The plaintiff in this case holds a high rank in the Uganda Police Force and the imputation against him of grave disloyalty to the Government was an act of serious defamation. On the other hand I am not unmindful of the submissions made by Mr. Clerk and have given due consideration to them. Giving the matter the best consideration I can on such material as is available, I assess the damages at Shs. 5,000/-.

I enter judgment for the plaintiff against the defendant for Shs. 5,000/-with interest and costs.

Judgment for the plaintiff.

For the plaintiff:

G. L. Binaisa. Q.C. and J. G. Wanume-Kibedi (instructed by Binaisa and Co., Kampala)

For the defendant:

A. V. Clerk (instructed by Clerk and Co., Kampala)

Against this decision the defendant appealed.

Odongkara v Astles
[1970] 1 EA 379 (CAK)

Division: Court of Appeal at Kampala
Date of judgment: 16 April 1970
Case Number: 5/1970 (90/70)
Before: Duffus P, Spry VP, and Law JA
Sourced by: LawAfrica

Held –

- (i) there is no need for the defamatory words to charge the commission of a specific crime provided there is an accusation of a crime in respect of which the plaintiff could suffer imprisonment;
- (ii) whether the words accused the plaintiff of treason (*per* Law, J.A.) or only of sedition (*per* Spry, V.-P.) (Duffus, P. not deciding) the words were defamatory and actionable *per se* as an accusation of a crime.

Appeal dismissed.

Cases referred to in judgment:

- (1) *Donne's Case* (1587), Cro. Eliz. 62; 78 E.R. 322.
- (2) *Webb v. Beavan* (1883), 11 Q.B.D. 609.
- (3) *Gray v. Jones*, [1939] 1 All E.R. 798.

The following considered judgments were read:

Judgment

Spry VP: This is an appeal from a judgment and decree of the High Court awarding the respondent Shs. 5,000/- as general damages for slander.

At the time when the plaint was filed, the respondent was an Assistant Commissioner of Police. The slander complained of was a statement, made to one person, that:

“A group of persons including the plaintiff were then meeting in the Uganda Club, Kampala and that the purpose of the meeting was to work out a plan to cause chaos and to overthrow the Uganda Government.”

The plaint alleged that by these words the appellant meant and was understood to mean that the respondent had committed or was planning to commit a criminal offence punishable with imprisonment.

The judge directed himself correctly on the law, asking himself whether reasonable men would regard the words complained of, construed in their natural and ordinary meaning, as defamatory. He directed himself also that, as no special damages were claimed, the alleged slander would only be actionable per se if it amounted to an imputation that the respondent had committed a crime “for which he could be made to suffer physically by way of punishment”.

The trial judge found that it was unnecessary to look for any innuendo because the words in their natural and ordinary meaning would make ordinary, just and reasonable men think of the respondent:

“as a man who had violated his allegiance to the Government and engaged in treasonable activity – in short, a traitor.”

Later, when dealing with the question whether the words complained of are actionable per se, he held that the words imputed that the respondent was guilty of the offence of treason contrary to s. 25 of the Penal Code Act.

There were two grounds of appeal: the first, against the finding that the words were defamatory and imputed the commission of an offence against s. 25 and the second against the quantum of damages.

Mr. Clerk, who appeared for the appellant, began by submitting that the words complained of could not, in their ordinary and natural meaning, be read as an imputation of treason. He argued that para. (a) of s. 25 could not apply and that two of the constituent elements of para. (b) were missing. These were the expression of the treasonable intention and the use of force of arms. I do not agree as regards the first, because I think attendance at the alleged meeting would have been such an overt act as would constitute expression within the meaning of the section (see s. 35 of the Penal Code Act). I think, however, that there is merit in the second part of the submission. It is possible to imagine a conspiracy to overthrow a

government by passive resistance. This might result in chaos, if all essential services were disrupted, but not necessarily in violence.

And even if violence resulted, contrary to the intentions of the conspirators, it would not appear to render them guilty of treason.

Mr. Clerk complained that the learned judge had relied on a passage in *Gatley on Libel and Slander* (6th Edn.), para. 154, at p. 85, which reads:

“The exact offence need not be specified; words involving a general charge of criminality will suffice, provided they impute some offence for which the plaintiff can be made to suffer corporally by way of punishment.”

In fact, I do not think the learned judge did rely to any extent on that passage, which he only quoted in setting out the arguments of Mr. Binaisa for the respondent, because he found that the words complained of did impute a specific offence. However, the question is relevant if, as Mr. Clerk submits, an offence against s. 25 could not be imputed. Mr. Clerk argued that the authorities do not support the proposition in *Gatley* quoted by the learned judge. I have examined the cases to which he referred (*Donne's Case*, 78 E.R. 322; *Webb v. Beavan* (1883), 11 Q.B.D. 609) and with respect I cannot agree. In my view, the quotation from *Gatley* is a correct statement of the law. I note also that in a more recent case in England, which was not cited to us, *Gray v. Jones*, [1939] 1 All E.R. 798, the words “You are a convicted person. I will not have you here. You have a conviction”, were held actionable per se. It was held on appeal that the jury were entitled, in the circumstances of the case, to interpret those words as meaning that the plaintiff had done something for which she could have been put in prison. That goes considerably beyond the present case, where the allegation was much more specific.

I think it is unfortunate that the learned judge, adopting the argument of Mr. Binaisa, based his decision on an imputation of treason, which was in my opinion overstating the case. I think, however, that there was clearly an imputation of sedition, that is, of an offence against s. 42 of the Penal Code Act and I do not think that the fact that this was not considered in the court below precludes our considering it. It is not going outside the pleadings and while in addressing the High Court Mr. Binaisa twice referred to treason and treasonable felonies, it was part of his argument that the exact offence need not be pleaded. Mr. Clerk submitted that sedition is an offence which is not necessarily punishable with imprisonment, but may be punished by a fine. There is no merit in this argument, since what matters is liability to imprisonment. Moreover, under s. 300 of the Criminal Procedure Code Act, a person liable to imprisonment can always be fined in lieu.

Mr. Clerk also argued that there was nothing in the words complained of that indicated a liability to corporal punishment, but I think that argument must fail if, as I think, there was a clear imputation of sedition.

I would hold, therefore, that the judge was right in finding that the words complained of were defamatory and that they were actionable without proof of special damage as imputing the commission of an offence involving liability to imprisonment.

As regards the damages awarded, Mr. Clerk submitted that they were so excessive as to justify an appellate court interfering. He submitted that this was a case where damages should be compensatory, not punitive. There had been publication only to a single person. There was no evidence that the respondent had suffered any loss and it was only after almost two years had passed that he had brought the suit. These are valid points, but I think the learned judge took them into account. Mr. Clerk argued in particular that the learned judge had erred in taking into account the admitted fact that at the time when the plaint was filed the respondent was an Assistant Commissioner of Police. It had not been pleaded or

admitted or proved that he held that, or

any other, rank at the time when the defamatory words were uttered. I think that this criticism is justified. At the same time, I do not think much weight should be given to it. To have been an Assistant Commissioner at the time of the plaint, the respondent must either have held some fairly senior rank in the Police at the time of the slander or have had some exceptional qualification or experience. There is, also another point to be considered: treason is a graver offence than sedition and consequently an imputation of treason is graver than an imputation of sedition. The judge based his decision on an imputation of treason and if, as I think, he was wrong in so doing, that could provide a reason for this court to interfere. Sedition is, however, an offence which may vary greatly: at the worst, it may fall little short of treason; at the other end of the scale, it may be comparatively trivial. Here, in my view, the sedition alleged, particularly the reference to causing chaos, was very serious and consequently the slander called for substantial damages. In assessing the damages, the learned judge referred to “grave disloyalty” and that expression could apply as well to sedition as to treason. I am not convinced that had the learned judge directed himself differently, he would necessarily have awarded any less amount and I see no reason to regard the award as manifestly excessive. Accordingly, although, as I have said, I think there are grounds on which we could interfere with the assessment, I do not think we should so so.

I would dismiss the appeal with costs. I would not give a certificate for two counsel.

Law JA: The facts are sufficiently set out in the judgment of Spry, V.-P., which I have had the advantage of reading in draft. The first ground of appeal complains that the judge was wrong in holding that the words admittedly spoken by the appellant were defamatory in their natural and ordinary meaning, in that they imputed that the respondent was guilty of treason contrary to s. 25 of the Penal Code. Mr. Clerk’s argument for the appellant on this ground is that two of the ingredients of the offence of treason are missing: the expression of a treasonable intention by an overt act and an intention to use force of arms. In my opinion, the allegation that the respondent was attending a meeting – presumably as a free and willing participant – is a sufficient assertion of an overt act; and as regards the use of force, I find it difficult to imagine any possibility, having regard to conditions as they are known to exist in Uganda, of a plan “to cause chaos and to overthrow the Uganda Government” being put into effect without the use of arms necessarily being involved. Passive resistance was clearly not what was contemplated by the appellant when he spoke the words complained of. In my view, the learned judge was right in his view that the words spoken by the appellant imputed the commission by the respondent of the offence of treason.

As regards the appeal against damages, it is true there was publication only to one person, but the imputation of treason is as grave an imputation as can be made. I do not think the damages of Shs. 5,000/- awarded to the respondent are so excessive as to demand reduction by this court.

I would dismiss this appeal with costs. I would not certify for two counsel.

Duffus P: I have had the advantage of reading the judgments of Spry, V.-P. and Law, J.A. in draft.

The defamatory words alleged that the respondent was conspiring with other persons to work out a plan to cause chaos and to overthrow the Uganda Government. This seems to be a definite accusation that the respondent was guilty of such treasonable activity as to, at any rate, make him guilty of the criminal offence of sedition punishable under s. 42 of the Penal Code to a five- year

term of imprisonment. I entirely agree with the trial judge and the Vice-President that there is no necessity for the defamatory words to charge the commission of a specific crime provided there is an accusation of a crime in respect of which the plaintiff could suffer corporal punishment. I do not find it necessary in this case to determine whether the defamatory words here could be so construed as to necessarily mean that the respondent had committed the crime of treason under s. 25 or only a lesser offence under s. 42.

This could only affect the question of the judge's assessment of damages. In his judgment the learned trial judge in discussing the meaning of the defamatory words said:

"I feel no doubt that such men would think of the plaintiff as a man who had violated his allegiance to the Government and engaged in treasonable activity – in short, a traitor."

and then in assessing the damages the judge said:

"The plaintiff in this case holds a high rank in the Uganda Police Force and the imputation against him of grave disloyalty to the Government was an act of serious defamation."

The judge was fully justified in these conclusions and I do not consider that it would have made any difference to his assessment of damages whether he found the words charged an offence of treason under s. 25 or of sedition under s. 42. I would agree, therefore, with Spry. V.-P., that this court should not interfere with the assessment of damages.

I would accordingly also dismiss this appeal with costs. As the other members of the court agree the appeal is dismissed with costs but without a certificate for two counsel.

Appeal dismissed.

For the appellant:

A. Clerk (instructed by *Clerk and Co.*, Kampala)

For the respondent:

G. L. Binaisa, Q.C. and *J. G. Wanume-Kibedi* (instructed by *Binaisa and Co.*, Kampala)

Fardin v Credit Finance Corporation Ltd and another
[1970] 1 EA 384 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	17 December 1969
Case Number:	345/1969 (50/70)
Before:	Russell Ag J
Sourced by:	LawAfrica

[1] *Damages – Hire purchase – Wrongful seizure by owner – Deduction of rental for period of use from*

damages awarded to hirer.

Editor's Summary

The plaintiff concluded a hire purchase agreement with the first defendant in respect of a car which the second defendant, a dealer, wished to sell. The second defendant guaranteed payment by the plaintiff of the hire purchase instalments. The plaintiff paid the deposit and contended he paid the first three months' rentals. Before the rental for the fourth month became due, the first defendant authorised the second defendant to seize and sell the car, which it did. The first defendant's manager admitted receipt of the rentals.

Held –

- (i) the seizure of the car was unlawful;
- (ii) the first defendant was the owner of the car and able to hire it to the plaintiff. Accordingly, there was no total failure of consideration as he had had the use of the first defendant's car for several months (*Butterworth v. Kingsway Motors, Ltd.* (1) distinguished);
- (iii) damages would be calculated by deducting from the total sum paid by the plaintiff a reasonable sum for the use of the car while it was in his possession.

Judgment for the plaintiff against the first defendant.

Cases referred to in judgment:

- (1) *Butterworth v. Kingsway Motors, Ltd.*, [1954] 2 All E.R. 694.
- (2) *Goulstone Discount Co., Ltd. v. Clark*, [1967] 1 All E.R. 61.
- (3) *Branwhite v. Worcester Works Finance Co.*, [1968] 3 All E.R. 104.

Judgment

Russell Ag J: The plaintiff entered into a hire-purchase agreement with the first defendant whereby he agreed to hire an Isuzu Pick-up car by paying a deposit of Shs. 14,900/- and 17 monthly rentals of Shs. 1,018/15 commencing on the 28 November 1968 and a final rental of Shs. 1,038/15. On the completion of those payments the plaintiffs would have the option of purchasing the said car for Shs. 20/-.

As the transaction was transacted by the second defendant the first defendant made it a condition that the second defendant guaranteed the punctual payment of the said rentals and observance of the terms and conditions of the said hire-purchase agreement by the plaintiff. This guarantee was endorsed on the hire-purchase agreement and signed by the second defendant and dated the same day as the hire-purchase agreement.

The plaintiff paid the deposit of Shs. 14,900/- and contends he paid the rentals of Shs. 1,018/15 to the second defendant as agent of the first defendant which fell due on 28 November 1968, 28 December 1968 and 28 January 1969

and the next rental would have fallen due for payment on 28 February 1969. It is the plaintiff's contention that despite the fact that he had promptly and fully implemented the terms of the said hire-purchase agreement the first defendant caused the said car to be seized on 15 February 1969, and it was subsequently sold on behalf of the first defendant by the second defendant. The plaintiff has therefore filed this suit against both defendants claiming repayment of the said deposit and rentals he has paid to the first defendant together with transfer charges of Shs. 200/- making a total of Shs. 18,469/60, costs of suit and interest.

In para. 3 of the written statement of defence the first defendant justified the said seizure and sale as follows:

"The plaintiff paid (albeit late) the first two such monthly hire rentals but failed to the third thereof due on 28 January 1969, whereupon the first defendant caused the said vehicle to be repossessed on 18 February 1968 as it was entitled to do under the terms of the said hire-purchase agreement."

When the suit came on for hearing the plaintiff testified he had duly and punctually paid the deposit and the said rentals and in rebuttal the first defendant called its Kampala manager, C. J. Patel, who testified that the first defendant had in fact received the rentals for November and December 1968 and January 1969 and the next rental did not accrue due until 28 February 1969. He also admitted having written a letter to the second defendant dated the 15 February 1969 authorising repossession.

He justified the seizure on two grounds, firstly that the second defendant had complained that they had had to pay the said rentals or rental as guarantors and had not been paid by the plaintiff and secondly because the plaintiff was in breach of the conditions of the said hire-purchase agreement as he had allowed the said car to be driven in the Congo.

Having observed the demeanour of this witness in the witness-box I am satisfied he was not speaking the truth as to the second alleged reason for the seizure and that he was only making a misguided effort to assist the second defendant by authorising them to purport to seize and sell the said car on behalf of the first defendant, recoup itself for any alleged indebtedness of the plaintiff and retain any profit it could make on the sale after liquidating any balance owing to the first defendant. Be it noted that the full purchase price of the car included Shs. 2,390/70 for interest calculated at 10 per cent in advance over the hire period of 18 months and this was paid in full although the car was seized and sold not more than four months from the date of the hire-purchase agreement.

Mr. C. J. Patel also frankly admitted that although the sale was on the instructions of the first defendant he was satisfied to receive the company's pound of flesh (i.e. the balance of the purchase price of Shs. 30,856/-) and any surplus then remaining could be kept by the second defendant. There was not the slightest desire or intention on the part of either defendant of behaving fairly and decently towards the plaintiff and paying to him any surplus realised by the sale over and above the balance due on the hire-purchase agreement.

Mr. Mawagi has referred me to *Goulston Discount Co. Ltd. v. Clark*, [1967] 1 All E.R. 61 and *Branwhite v. Worcester Works Finance Co.*, [1968] 3 All E.R. 104 but neither of those cases appear to me to be pertinent to the issues in the instant suit.

It appears to me abundantly clear that the first defendant caused the said car to be seized and sold without any legal justification whatsoever as it had in fact received the current hire rentals in full at the time of the said seizure. It is also quite clear that the plaintiff is entitled to damages in respect of that unlawful

seizure. Neither counsel have however been able to assist me regarding the principles upon which such damages should be assessed.

The plaintiff in this suit has sued for the recovery of all sums paid under or pursuant to the hire-purchase agreement presumably basing such claim that such sums were paid on a consideration which has wholly failed as in the case of *Butterworth v. Kingsway Motors Ltd.*, [1954] 2 All E.R. 694. In that case however the car which was the subject matter of the hire-purchase agreement had been seized during the period of the hiring by the rightful owner whose title to the car was superior to that of the hirer. In such cases it is clear that in assessing the damages no allowance should be made to the defendant for a reasonable hiring charge during the period the plaintiff had been in possession of the car for the simple reason that the defendant was not the owner of the car and was not entitled to charge for its use.

The facts in the present suit must be distinguished from those in the *Butterworth* case as the first defendant was admittedly the owner of the Isuzu car and could have given a good title if the plaintiff had become entitled to exercise his option to purchase the same for Shs. 20/- after payment in full of the 18 monthly rentals.

The real rental value of the said car is obviously not the same as the agreed monthly rentals as the purchase element in the hire-purchase agreement out-weighs the rental element. It must however be borne in mind that the plaintiff had the use of the car for about four months and it could not be seriously contended on the facts in this suit that there has been a total failure of consideration.

The difficulty and artificiality about hire-purchase cases arise from the fact that members of the public imagine themselves to be buying cars by instalments from dealers such as the second defendant whereas in law they are the hirers of the cars from finance companies with whom they have not been brought into contact, of whom they know nothing, and which, on their part, have never seen the cars which are the subject matter of the hire.

Having given the matter careful consideration I am of the opinion that the plaintiff is entitled to recover the full amounts paid to the first defendant less a reasonable sum to be assessed in respect of his use of the said car while it was in his possession. I am prepared to hear counsel on this issue and, if counsel are unable to agree on a reasonable figure, to accept evidence thereon.

Judgment for the plaintiff.

For the plaintiff:

E. R. K. S. Mawagi (instructed by *Mawagi & Co.*, Kampala)

For the first defendant:

O. J. Keeble (instructed by *Hunter & Greig*, Kampala)

For the second defendant:

V. N. Ponda (instructed by *Ponda Asaria & Co.*, Kampala)

Uganda Millers Ltd v Batende Agencies (Uganda) Ltd

[1970] 1 EA 387 (HCU)

Division: High Court of Uganda at Kampala
Date of judgment: 10 December 1969
Case Number: 303/1968 (51/70)
Before: Russell Ag J
Sourced by: LawAfrica

[1] Estoppel – Conduct, by – Inaction – Estoppel by inaction or silence exists only when a specific duty to act is owed to the other party – Evidence Act (Cap. 43), s. 113 (U.).

Editor's Summary

The plaintiff sold wheaten products to the defendant. The defendant customarily sent its driver to the plaintiff with an order sheet and a blank cheque to pick up the goods. The plaintiff then filled in the amount on the cheque. There was no dispute over the plaintiff's claim but the defendant counterclaimed in respect of goods which it stated it had neither ordered nor received. During a period of about seven months, the defendant's driver appeared with altered orders. These orders were filled by plaintiff's sales clerk even though he noticed the alterations. Although he avers he attempted to contact the defendant's manager about the alterations, he never succeeded. The defendant's driver was later convicted of theft of the goods obtained by the alterations. The plaintiff claimed that either the driver had actual or ostensible authority to make alterations or that the defendant was estopped from denying liability since any examination of its bank statements would have indicated irregularities, and this the defendant neglected to do, although it gave an explanation of the failure.

Held –

- (i) There was no evidence that the driver had actual authority to alter orders;
- (ii) The plea of ostensible authority failed, since all of the orders were altered before the driver arrived at plaintiff's premises and there was no evidence as to who altered them;
- (iii) The defendant was under no duty to the plaintiff to make any checks and its inaction could not amount to a representation for the purpose of founding an estoppel.

Judgment for the plaintiff on the claim and for the defendant on the counterclaim.

Cases referred to in judgment:

- (1) *Lloyd v. Grace, Smith & Co.*, [1911-13] All E.R. Rep. 51.
- (2) *Mercantile Bank of India Ltd. v. Central Bank of India Ltd.*, [1938] 1 All E.R. 52.

Judgment

Russell Ag J: The plaintiff company is claiming the sum of Shs. 49,199/10 from the defendant company

for goods sold and delivered to the defendant on its written orders during the period from the 26 March 1968 to the 1 April 1968. Although the agreement between the parties was that the said sales were to be for cash the plaintiff in fact accepted cheques in payment against delivery and holds the defendant's cheques dishonoured by non-payment in respect of those goods for an aggregate sum of Shs. 60,894/10.

The explanation for the discrepancy is that the wheaten products ordered by the defendant from the plaintiff fluctuated in price from time to time and the said cheques sent by the defendant to the plaintiff had been calculated on a price higher than the current prices being charged from time to time by the plaintiff.

The defendant in its written statement of defence admitted the plaintiff's claim for Shs. 49,199/10 subject to its counterclaim for Shs. 63,550/75 in which it alleged that during the period from the 18 May 1967 to the 5 December 1967 the plaintiff had received from the defendant payments amounting in the aggregate to the said sum of Shs. 63,550/75 in respect of goods which it had neither ordered nor received. In its reply to the counterclaim the plaintiff in para. 2 pleaded as follows:

- "2. The plaintiff admits having made additional cash sales and debited the defendant's accounts with the additional cash sales as claimed in para. 4 of the counterclaim. Such sales were made at the request of and delivery was made to the servant or agent of the defendant actually or ostensibly authorised in that behalf by the defendant. In the alternative such sales were subsequently ratified either expressly or impliedly by the defendant. The last sentence of para. 4 of the counterclaim is accordingly denied."

It was at first sight surprising that disputes as to orders, deliveries and payments should arise between the parties in relation to transactions which were to be on a cash against order basis but both parties appear to have had confidence in the integrity of each other as the plaintiff accepted the cheques of the defendant against deliveries and, during the period in issue in the counterclaim, the defendant sent with its lorry driver with each order its signed cheque made out in favour of the plaintiff but with the amount left blank for completion by the plaintiff. The plaintiff would fill in the price of the goods and hand cash sales invoices to the defendant's driver for delivery to the defendant.

Without very strict control this procedure obviously left the door wide open to fraud and the defendant's driver admittedly seized the opportunity of enriching himself (and possibly some associates) at the expense of either the plaintiff or defendant companies. The issue now to be decided is which of two innocent parties must suffer the very substantial loss which has admittedly occurred.

Although the amount involved is large the facts are basically simple. At the commencement of the hearing Mr. Keeble for the plaintiff contended that as the amount claimed in the plaint had been admitted the onus of proving the claim on the counterclaim rested on the defendant. Mr. Wilkinson for the defendant contended that the onus lay on the plaintiff as it had admitted "additional cash sales as claimed in para. 4 of the counterclaim" had been made "at the request of and delivery made to the duly or ostensibly authorised agent or servant of the defendant". Although the wording of the reply to the counter-claim was by no means clear it appeared to me that on balance it was preferable for the plaintiff to open as it had alleged delivery of the goods to the defendant's agent. It had also admitted more than one sales invoice having been made out in respect of a single order in respect of a large number of orders and that orders had in certain instances been altered by the defendant's driver; it had also pleaded ratification or in other words, estoppel.

The first witness for the plaintiff was Mr. F. J. Hunt who testified he was the sales manager for the plaintiff company at all times relevant to the counterclaim. The plaintiff sold goods on a cash basis only and on the sale of goods a cash sales invoice used to be made out by the then sales clerk, normally Mr. Waibi. The cash sales invoices were contained in a machine and the sales clerk wrote out the invoice on the top white copy and this was copied through onto yellow, pink and green copies. By turning a handle the top white, yellow and pink

copies are extruded from the machine and the remaining green copy retained in the machine. The white copy was handed to the customer or his agent and the yellow copy was signed by the customer or his agent by way of acknowledgment of delivery and was then passed to the sales manager's office as part of the company's sales records for statistical purposes. The pink copies went to the chief accountant together with a daily sales reconciliation and the green copy was left in the machine as a spare copy for filing.

Mr. Hunt produced a bundle of yellow cash sales invoices which were admitted. They were written by Mr. Waibi and have been signed by the defendant's driver Mubiru; he was unable to produce the pink copies as these were handed over to Mr. Kasozi, the defendant's managing director, by Mr. Hunt about the middle of January 1968 and were subsequently mislaid or lost by the defendant. Mr. Hunt confirmed that the course of dealing at the material time was that written orders were received purporting to have come from the defendant and that as soon as the goods had been supplied the cost was calculated and filled in by the sales clerk in the defendant's cheque for the amount so calculated. He handed over the said yellow cash sales invoices to Mr. Kasozi because Mr. Kasozi informed him that he thought the original order forms had been tampered with and he suspected his driver. About ten to fourteen days later Mr. Kasozi requested Mr. Hunt to compare the original order forms with the defendant's duplicate copies and Mr. Hunt did so and found that in some cases they tallied but in other cases they did not tally and in some cases there were no duplicate copies of the orders. As a result Mr. Hunt telephoned the police who came and arrested the defendant's driver Mubiru who was subsequently prosecuted and convicted of theft of the said goods or a cognate offence.

Mr. Hunt further testified that on previous occasions goods had been supplied on orders which had clearly been altered and they had been paid for without demur by the defendant. In support of his contention he produced a bundle of yellow cash sales invoices and the relative orders which were admitted. He also produced a further similar bundle made out during the controversial period between 18 May 1967 and the 5 December 1967, which were admitted. Only two of the cash sales invoices in that bundle were pink forms and the remainder were yellow forms as the remainder of the pink forms had been handed to the police and had been lost or misplaced by them. He stated that although the alterations were apparent on the face of those orders he did not know who had made or authorised the alterations. By the word "ratification" in the reply to the counterclaim he understood the alleged ratification was by the driver who signed the cash sales invoices acknowledging receipt of the goods but he had no direct personal knowledge of the transactions and could not put forward any explanation as to why on occasions two separate cash sales invoices had been made out in respect of the same order on the same day.

Mr. C. Waibi, the second witness called by the plaintiff, testified that he was the plaintiff's sales clerk during the period relevant to the counterclaim and that he did not know who had made the alterations to the various order forms handed in to him by the defendant's driver as they had all already been altered before they were handed in by the driver at the plaintiff's factory. He went on to state that the driver told him he was authorised to take delivery of part of an order if the whole of an order could not be accommodated in one lorry load.

If the driver took delivery of part of an order only Mr. Waibi made a note to that effect on the cash sale invoice and when he came for the balance he again made a note to that effect on the relevant cash sales invoice.

Up to this stage in Mr. Waibi's evidence there was no suggestion that the driver had any authority in

excess of that of the normal run of lorry drivers whose duties were to hand in the orders of their employers and take delivery

of the goods therein specified. He then however went further and testified the driver had told him he was authorised to take more goods than had been ordered if he had room to accommodate them on the lorry. He also said he could reduce an order if he so wished and he did in fact reduce orders on occasions.

This witness was not impressive in cross-examination as he testified at first:

“I knew the lorry 261 of the defendant. I do not know if it was a 10-ton lorry or the number of bags of flour it could carry. I never checked a load on the lorry. It was not my duty to check what was loaded onto a lorry. I had no sources of information as to what was loaded on to a lorry. I used to assume the load mentioned in a cash sale was loaded onto a lorry whose number was written on the c/s invoice.”

He then testified:

“I and two others used to check what was loaded onto the lorry – I knew that on occasions the defendant’s lorry carried a load of 120 bags of flour. I do not know of any reason why the lorry could not take 100 bags of flour on any one trip, some of the cash sales invoices show a load to 10 bags of flour only. I do not know if the lorry came to Jinja for the sole purpose of collecting 10 bags of flour. I did not discuss the matter with the driver. He informed me on occasions that the lorry was not in good condition and on other occasions that he was afraid of the traffic police and gave these as the reasons why he left 10 bags behind out of an order.”

This witness further testified that he did not know who had written out the orders but he did notice they had been altered when they were handed in and he queried the alterations with the driver. He continued:

“I also endeavoured to get in touch with Mr. Kasozi on the telephone but I never succeeded in being connected to him. The reason why I wanted to consult Mr. Kasozi was because I was unhappy about the alterations. I did not consult Mr. Hunt or anyone else as I am interested in making sales only. I was worried because the alterations were increasing. If I had succeeded in speaking to Mr. Kasozi I would have asked him if he or the driver had made the alterations.”

He was then re-examined by Mr. Keeble and stated:

“I do not know how many times I tried to get hold of Kasozi. I did not continue to try to get in touch with Kasozi as there was no reaction when we supplied goods on an altered order and filled in cheques for the altered quantities.”

The first witness called for the defendant was Mr. Kasozi, the managing director of the defendant company. His testimony was short and he was not in the least shaken on any material issue in cross-examination. He testified briefly that the driver Mubiru had no authority to alter order forms or in fact perform any services for the company other than driving its lorry, handing in orders and collecting the goods ordered by the defendant. The goods were collected from the factory and delivered direct to the defendant’s customers as the defendant had no godown or storage facilities in Kampala. The alterations on the orders which resulted in goods being delivered to the said driver which had not been ordered by the company were as set out in the annexure to the counterclaim. He first suspected something was wrong in December 1967 when his bank account seemed to be short.

In cross-examination he further testified that at the relevant time the defendant company’s manager, Mr. Shamsuddin Rehmu, was ill and died before resuming his duties of keeping the defendant’s books of account. The witness

did not personally understand accounts and did not examine the bank statements as he was hoping Rehmu would recover and bring the accounts up to date. He was a director of and took an active part in the affairs of about five companies.

Mr. Keeble for the plaintiff contended the driver had represented to Mr. Waibi that he, the driver, had authority to alter the defendant's written orders and had in fact done so and that Mr. Waibi had tried to contact Mr. Kasozi on half a dozen occasions but had failed to do so. He admitted the conduct of Mr. Waibi was naive and stupid but Mr. Kasozi had continued to honour the orders for over 6 months and having done so there was a representation by silence that the driver had ostensible authority. In support of his argument he quoted from *Bowstead on Agency* (12th Edn.), at p. 10 and the well known case of *Lloyd v. Grace, Smith*, [1911-13] All E.R. Rep. 51.

As to his first point there is no direct evidence on record that the driver did in fact represent to Mr. Waibi that he, the driver, had authority to alter the defendant's order forms but on the contrary Mr. Waibi testified that all the order forms had been altered prior to being handed in at the factory and he, Mr. Waibi, did not know who had altered them. He did allege the driver had told him he had authority to accept a larger or a smaller quantity of goods than the quantities written out on the orders but in such case it is patent that the order form would have to be altered. As Mr. Waibi testified that all the alterations had been made prior to the orders being handed in by some person unknown it is obvious that even if the driver did have any such authority, ostensible or otherwise, such authority was not exercised in relation to any of the orders during what I may term the disputed period, particulars of which are set out in the annexure to the counterclaim. Having heard Mr. Waibi in the witness-box I do not believe his testimony that the driver told him he had authority to vary the quantity of goods ordered.

The *Lloyd v. Grace Smith* case does not assist the plaintiff as in that case the managing clerk of the defendant firm of solicitors committed frauds in the course of his employment and not outside the scope of his authority. I accept the unchallenged testimony of James Kasozi that the driver did not have any actual authority to alter the said orders nor is there any evidence on record to establish the plaintiff's contention that he had any ostensible authority. In its reply to the counterclaim the plaintiff contends in the alternative that the said sales were ratified by the defendant and in argument Mr. Keeble made it clear he was relying on the doctrine of estoppel.

Estoppel is defined in s. 113 of the Evidence Act (Cap. 43) which reads:

"113. When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

From the evidence on record I am satisfied the defendant company, through its managing director, Mr. Kasozi, did not intentionally cause or permit the plaintiff to believe that the orders had been lawfully altered by any agent on its behalf. Putting the case for the plaintiff at its highest it could only contend that the defendant should have kept a running check on its bank account and statements furnished by the bank and if it had done so and had observed the said irregularities and failed promptly to point them out to the plaintiff it could reasonably be argued that it had made a representation by acquiescence, silence or inaction and that it had "ratified" the forgeries or alterations to the orders.

It is well established that under certain conditions silence or inaction may constitute a representation, as much as positive language or conduct, for the

purpose of an estoppel. The main condition subject to which alone silence or inaction counts as a representation is that a legal duty shall have been owed by the representor to the representee to make the disclosure, or take the steps, the omission of which is relied on as creating the estoppel (*Mercantile Bank of India Ltd. v. Central Bank of India, Ltd.*, [1938] 1 All E.R. 52). It has not been contended that the defendant was under any legal obligation to the plaintiff to keep its books properly posted and regularly check its monthly bank statements and verify the amounts for which the plaintiff had filled in the defendant's cheques with such of the plaintiff's cash sales invoices as may have come into the defendant's possession and its own duplicate copies of its orders.

The defendant has given a reasonable explanation for its failure to observe the irregularities, namely the illness and death of its manager, and as soon as the irregularities came to its notice it promptly notified the plaintiff. On the other hand the plaintiff's sales clerk, Mr. Waibi, noticed and was worried by the flagrant alterations in the orders and made futile attempts to notify the defendant. It would have been a simple matter for him to have sent duplicate copies of the cash sales invoices to the defendant or make out a statement of account or merely cause a letter to be written directing the defendant's attention to the alterations. His conduct, in the words of Mr. Keeble, was naive and stupid particularly in making out on occasion two cash sales invoices in respect of one order on the same day without further inquiry.

For these reasons I am of the opinion that the plaintiff has failed to establish that the additional cash sales referred to in paragraph 4 of the counterclaim were made at the request of and delivery made to the servant or agent of the defendant actually or ostensibly authorised in that behalf by the defendant as alleged in the reply to the counterclaim. I am also of the opinion that the plaintiff has also failed to establish its allegation in the alternative that such sales were subsequently ratified either expressly or implicitly by the defendant.

There is no real dispute as to the items in the annexure to the counterclaim and the defendant is entitled to the full amount of Shs. 63,550/75 as claimed.

The plaintiff has succeeded in its claim for Shs. 49,199/10 on the plaint and the defendant has succeeded in its claim on the counterclaim for Shs. 63,550/75, and I am prepared to hear counsel on the form of order to be made and the question of costs.

*Judgment for the plaintiff on the claim
and for the defendant on the counterclaim.*

For the plaintiff:

O. J. Keeble (instructed by *Hunter & Greig*, Kampala)

For the defendant:

P. J. Wilkinson, Q.C. and *E. K. Sebunya* (instructed by *Sebalu & Co.*, Kampala)

Eustace v Republic
[1970] 1 EA 393 (CAD)

Division: Court of Appeal at Dar-es-Salaam

Date of judgment: 30 January 1970

Case Number: 180/1969 (52/70)
Before: Sir Charles Newbold P, Duffus VP and Spry JA
Sourced by: LawAfrica

[1] Criminal Practice and Procedure – Jurisdiction – Whether one magistrate can continue trial begun by another – Criminal Procedure Code, s. 196 (T.).

[2] Criminal Practice and Procedure – Trial – Nullity – Whether trial conducted by succession of magistrates a nullity – Criminal Procedure Code, s. 196 (T.).

[3] Jurisdiction – Magistrate’s Court – Whether one magistrate can continue trial begun by another – Whether trial conducted by succession of magistrates a nullity – Criminal Procedure Code, s. 196 (T.).

Editor’s Summary

The appellant was charged with stealing by a public servant and his trial was conducted by three magistrates, relying on the Criminal Procedure Code, s. 196. After an unsuccessful appeal to the High Court, on a further appeal

Held – One magistrate may continue and complete a trial begun by another magistrate but a trial cannot be conducted by a succession of magistrates.

Appeal allowed. Retrial ordered.

No cases referred to in judgment.

Judgment

The judgment of the court was read by **Spry JA**: In July 1967, the appellant was charged in the court of a resident magistrate with stealing money which had come into his possession by virtue of his employment in the public service and which was the property of the Tanzania Government.

The trial began on 4 September 1967, before Mr. Agege, when the evidence of one witness was taken. After five adjournments, the trial was resumed on 8 November 1967, when the evidence of another witness was taken. After four further adjournments, the evidence of a third witness was taken on 29 January 1968. There were further adjournments, during which Mr. Agege went on leave and his place was taken by Mr. Thomas. On 10 April 1968, the trial was resumed, when the advocate for the appellant stated that he did not wish any of the witnesses who had given evidence to be recalled. Three further witnesses were called for the prosecution and the appellant himself gave evidence. After the court had been addressed on behalf of the prosecution and the defence, judgment was reserved until 2 May 1968.

Thereafter, nothing appears to have happened until 22 July 1968, when Mr. Meela sat as resident magistrate. The prosecutor is recorded as having said that the proceedings should be re-commenced de novo, except as regards one witness. The appellant asked that no date should be fixed for the hearing in the absence of his advocate. There was a further mention before Mr. Meela on 5 August 1968, and a mention before another magistrate on 17 October 1968. On 5 November 1968, the appellant appeared before yet another magistrate, Mr. Osakwe, when his advocate indicated that he had no objection to a

judgment being written by Mr. Osakwe. The appellant himself concurred and said that he did not wish any of the witnesses recalled.

Judgment was given by Mr. Osakwe on 16 November 1968. The appellant appealed unsuccessfully to the High Court. He then applied for leave to appeal to this court and leave was granted by the Chief Justice:

“on the question as to whether or not on the state of the record it can be assumed that s. 196 Criminal Procedure Code was complied with and whether or not the appellant was materially prejudiced.”

It would appear that when he granted leave, the Chief Justice was relying on the typed copy of the record certified by the Registrar, as were we at the hearing of the appeal. We have since examined the manuscript and found that the typed record was seriously defective, in particular, omitting the proceedings before Mr. Osakwe. Had a proper record been before the Chief Justice, it is clear that he would not have granted leave to appeal, or at least not in the terms he did. Moreover, much of our time would not have been wasted.

From the manuscript record, it is clear that the appellant's contention on the appeal that he had not consented to the giving of judgment by Mr. Osakwe is without merit. While we deplore the excessive delays in this matter, we would have dismissed the appeal but for a question which we must raise of our own motion: that is, whether Mr. Osakwe had any jurisdiction to write and deliver his judgment. In the absence of statutory provision, one magistrate could not continue a trial begun by another. The only such provision is contained in s. 196 of the Criminal Procedure Code. This reads as follows:

“196 (1) Where any magistrate, after having heard and recorded the whole or any part of the evidence in any trial or conducted in the whole or part any preliminary inquiry, ceases to exercise jurisdiction therein and is succeeded, whether by virtue of an order of transfer under the provisions of this Code or otherwise, by another magistrate who has and who exercises such jurisdiction, the magistrate so succeeding may act on the evidence or proceeding recorded by his predecessor, or partly recorded by his predecessor and partly by himself, or he may, in the case of a trial, re-summon the witnesses and recommence the trial or, in the case of an inquiry recommence the inquiry:

Provided that:

- (a) in any trial the accused may, when the second magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard and shall be informed of such right by the second magistrate when he commences his proceedings;
- (b) the High Court may, whether there be an appeal or not, set aside any conviction passed on evidence not wholly recorded by the magistrate before the conviction was had, if it is of the opinion that the accused has been materially prejudiced thereby and may order a new trial.
- (2) Nothing in subsection (1) shall be construed as preventing a magistrate who has heard and recorded the whole of the evidence in any trial and who has, before passing the judgment, ceased to exercise jurisdiction therein, from writing the judgment and forwarding the record of the proceedings together with the judgment to the magistrate who has succeeded him for the judgment to be read over and, in the case of conviction, for the sentence to be passed by such other magistrate.”

We think that this section, on a true interpretation, allows one magistrate to continue and complete a trial begun by another magistrate. We do not consider that it can properly be read as authorizing the conduct of a trial by a succession of magistrates. It may be noted, although we do not base our decision on this,

that the proviso to sub-s. (1) refers to “the second magistrate”, which appears to confirm that the section applies only to two magistrates.

Mr. Osakwe was the third magistrate to conduct the trial of the appellant and we think that as such, he had no jurisdiction to continue the trial: it follows that the conviction and sentence passed are a nullity and that the trial as a whole was abortive. In these circumstances, we see no alternative to quashing the conviction of the appellant, setting aside the sentence passed on him and ordering that he be re-tried de novo, and we so order. We would add that if the new trial leads to a conviction, the time the appellant has spent in prison serving the sentence at present imposed on him must be taken into account when sentence is passed. The appellant is to have liberty to apply to a magistrate for bail pending his re-trial, and if he does so, the magistrate should grant bail, on such terms as he thinks appropriate, unless he sees good reason to refuse it.

Appeal allowed. Retrial ordered.

The appellant in person.

For the respondent:

M. Chandu (State Attorney, Tanzania)

Rajabu v Republic
[1970] 1 EA 395 (CAD)

Division:	Court of Appeal at Dar-es-Salaam
Date of judgment:	17 March 1970
Case Number:	182/1969 (71/70)
Before:	Sir Charles Newbold P, Duffus VP and Spry JA
Sourced by:	LawAfrica

[1] Evidence – Possession of weapon used in crime – Whether evidence that possessor participated – Factors to be considered.

[2] Evidence – Expert – Ballistics – Shotgun identified from spent cartridge – Not justified.

Editor’s Summary

In October 1968 a spent shotgun cartridge was found at the scene of a robbery. In November 1968 a man was killed by a gunshot during a robbery and a spent shotgun cartridge was found at the scene. In February 1968 the appellant was found in possession of a shotgun. At the trial of the appellant on a charge of murder a police officer gave evidence identifying with absolute accuracy the cartridges as having been fired from the shotgun found in the appellant’s possession. No other evidence connected the

appellant with the murder. The appellant was convicted of murder and appealed. At the hearing of the appeal text books concerning firearms identification were produced to the court.

Held –

- (i) The positive identification of the shotgun was wholly unjustified;
- (ii) possession of an article directly connected with a crime may lead to the irresistible inference that the possessor participated in the crime;
- (iii) in the circumstances, and in particular the length of the time which had elapsed between the crime and the possession, no irresistible inference could be drawn.

Appeal allowed.

Case referred to in judgment:

- (1) *Andrea Obonyo v. R.*, [1962] E.A. 542.

Judgment

The judgment of the court was read by **Sir Charles Newbold P:** On 2 October 1968, a Greener shotgun No. 8647 was stolen from Mohamed Maunde at Kingolwira Village. On 25 October 1968, a robbery involving the use of firearms took place at Pangani Village and a spent shotgun cartridge was found at the scene. On 11 November 1968, a robbery took place at Mafisa Village during which Mwinyimuva Simba was killed by a gunshot. A spent shotgun cartridge was found at the scene. The villages at which these incidents took place and the village where the appellant lives are in the same general area. On or about 18 December 1968, the appellant was arrested on a charge which was subsequently withdrawn and he was released from custody on or about 15 January 1969.

On 21 February 1969, the police acting on information searched the appellant while he was on a main road and he was found to be in possession of the Greener shotgun No. 8647, which was stolen on 2 October 1968, and two unused cartridges. The appellant was charged with the murder of Simba and at his trial he denied that he was found in possession of the gun and cartridges. The prosecution called Assistant Superintendent of Police Malangalila who stated that in 1964 he obtained a diploma in firearms identification in the U.S.A., that since then he had been dealing with ballistics and that he was a ballistics expert. He stated, inter alia, that he had compared under a comparison microscope the pin impression of the spent cartridges found at the scene of the robbery at Pangani Village and at the scene of the murder with the pin impression of a cartridge test-fired from the Greener shotgun and he was convinced that all the cartridges had been fired from that gun. He was most assertive and definite in his evidence and stated the identification was made with “absolute accuracy”, that there was “no possibility of error”, and that the degree of accuracy in respect of the identification of pin impressions of shotgun cartridges was the same as that on the identification of finger prints.

The trial judge, having questioned the officer on the certainty of identification of the pin impression, accepted his evidence, found that Simba had been killed on 11 November 1968, by a gun-shot from the Greener shotgun which was found in the possession of the appellant on 21 February 1969, and that the “irresistible inference” was that it was the appellant who had fired the shot which killed the deceased. The trial judge convicted the appellant of the murder of Simba and sentenced him to death. The appellant appealed against that conviction.

As there was no other evidence linking the appellant with the murder of Simba it was clear that the conviction could not be upheld unless, first, the evidence left no doubt that the gun found in the possession of the appellant had fired the cartridge found at the scene of the murder and, secondly, that the only possible reasonable inference to be drawn from the fact that the appellant was found in possession of the murder weapon on 21 February 1969, was that he had fired that weapon at the time of the murder on 11 November 1968.

As regards the first point, as we had never in our experience come across such positive evidence of identification of pin impressions from spent cartridges as that given by Assistant Superintendent of Police Malangalila, an officer whose experience was obviously limited as it did not extend for more than five years, we asked Mr. Kilindu, who appeared for the Republic, if he could make available to us any text-books on firearms identification in the possession of the Assistant Superintendent of Police. Mr. Kilindu, after first showing them to Mr. Kanabar, produced for us three such books.

The first of these was Firearms Investigation, Identification and Evidence, by Major-General Hatcher,

Lt.-Colonel Jurey and Jac Weller, all experts in the knowledge and use of firearms and the first two of whom dealt particularly with the problems of firearms identification. At p. 386, when dealing with the pin

impressions of rifled weapons where the explosive pressures are higher and the impressions consequently clearer, the authors say:

“The more one sees of the breech faces of different weapons and their firing pins, as well as the way that these surfaces are finished, the more one becomes convinced that similarity of cartridge case markings is rare and identity never encountered at all. For some reason almost every revolver and automatic will impart some striking mark or marks. The presence of these on two different cartridges is a strong indication of identity; however, in the absence of other similar points, it should never be taken as positive.”

At p. 337 when dealing with the pin impressions of shotguns the authors say:

“Unfortunately, for identification purposes, the pressure inside the chamber of a shotgun is far lower than that encountered even in hand guns. This is a particular disadvantage . . . since the family characteristics are even fainter than breech face and firing pin impressions from pistols. These markings, however, can be extremely illuminating in some cases . . . The Identification Laboratory will not want to state definitely in any given instance the exact make and model firing a crime shell: however, no harm at all will be done to your prestige if you state a probability that turns out to be correct.”

Thus, these very experienced officers state that police officers with years of experience in firearms identification and all the facilities of the most modern laboratory equipment and the advantage of discussion with similar experienced officers are not prepared to identify positively the pin impressions of a cartridge fired from a rifle and are not even prepared to identify the make and model of the weapon which fired a shotgun cartridge.

To the same general effect are the following passages from the other two text-books made available to us. In *An Introduction to Tool Marks, Firearms and the Striagraph*, by John E. Davies, a police officer specifically concerned with the identification of firearms, the author states, at p. 78:

“Firing pin impressions are quite often specifically identifiable with the weapon in which firing took place. . . . While most firearm examiners have made a study of the shapes and styles of rim fire (particularly the 22 calibre) firing pin marks with a view to determining the probable weapon used, it seems less consideration has been given to centre fire marks.”

In *Firearms Identification*, by J. H. Matthews, a University Professor specifically concerned with firearms identification, the author states at p. 3:

“Similarly the marking produced on the head of a fired cartridge (shell) often can give valuable information as to the type and make of gun used and often can identify the particular gun when located.”

It is quite clear that the positive evidence of identification given by Assistant Superintendent of Police Malangalila was wholly unjustified. An expert witness merely gives opinion evidence and the value of that evidence depends upon the experience and ability of the witness and the extent to which his opinion is supported by the opinion and experience of other recognised experts in the particular field. Tanzania is fortunate in possessing a police officer with a qualification in firearms identification, but there is a very real duty on that officer not to pretend to a knowledge which he does not possess and not to assert a positiveness which does not exist. We have come to the conclusion that the opinion evidence of Assistant Superintendent of Police Malangalila identifying beyond doubt the cartridge found at the scene of the murder as having been fired from the Greener shotgun found in the possession of the appellant cannot be

accepted, and that any similar evidence given by this officer in the courts should be regarded with suspicion and not accepted unless other factors exist.

As regards the second point, even if the Greener gun found in the possession of the appellant on 21 February 1969, had been proved to be the gun which fired the cartridge found at the scene of the murder on 11 November 1968, would this fact alone suffice to convict the appellant of the murder? The fact of possession of the murder weapon on 21 February 1969, is merely circumstantial evidence of the guilt of the appellant and before he can be convicted that evidence must be incompatible with the innocence of the appellant and incapable of explanation upon any reasonable hypothesis other than his guilt. In other words, possession of the gun on 21 February 1969, must lead to the irresistible inference that the appellant fired it on 11 November 1968.

Possession of an article which is proved to be connected directly with a crime after the commission of the crime may, in certain circumstances, lead to the irresistible inference that the possessor of the article participated in the crime (see *Andrea Obonyo v. R.*, [1962] E.A. 542). There are a number of factors which have to be considered before any such inference can be said to be irresistible. The chief amongst such factors are the length of time between the commission of the crime and the date on which the article is found in possession of the accused; the circumstances of events between those dates; the nature of the article and the explanation or lack of it of the accused for such possession. In this case the period of time was 3 1/2 months, a period so long that save in the most exceptional circumstances no court should be satisfied that possession on a particular date led irresistibly to possession and use 3 1/2 months earlier. It is true that the nature of the article and the false denial of possession tend towards such an inference. But the circumstances of events during that period tend against it. There was no evidence that the appellant had been seen in possession of a similar gun during that period and for an appreciable part of such period the appellant was clearly not in physical possession of the gun as he was in police custody. Thus we are satisfied that even if the gun had been proved to be the gun which caused the death of Simba, its possession on 21 February 1969, by the appellant would not lead irresistibly to the inference that it was the appellant who had murdered Simba.

For these reasons we allow the appeal of the appellant, quash his conviction for murder and set aside the sentence of death imposed on him.

Appeal allowed.

For the appellant:

T. C. Kanabar (instructed by *Nathoo & Co.*, Morogoro)

For the respondent:

G. M. B. Kilindu (State Counsel)

Shikwaya v Republic
[1970] 1 EA 399 (HCK)

Division: High Court of Kenya at Nairobi

Date of judgment: 5 February 1970

Case Number: 1097/1969 (73/70)
Before: Mwendwa CJ and Wicks J
Sourced by: LawAfrica

[1] Criminal practice and procedure – Sentence – Corporal punishment – Limit of Senior Resident Magistrate’s jurisdiction – Criminal Procedure Code (Cap. 75), s. 7 (K.), Penal Code (Cap. 63), ss. 27, 296, 297, 308, 322 (K.).

Editor’s Summary

The jurisdiction of a Senior Resident Magistrate to award corporal punishment is limited to 24 strokes except in the case of offences under the Penal Code, ss. 296, 297, 308 and 322.

Sentence varied.

No cases referred to in judgment.

Judgment

The judgment of the court was read by **Mwendwa CJ**: In this case the appellant was convicted by a senior resident magistrate of personating a police officer contrary to s. 105 (b) of the Penal Code and of theft from the person contrary to s. 279 (a) of the Penal Code. He was sentenced to serve a term of imprisonment of 2 1/2 years on the first charge and 7 years’ imprisonment and 30 strokes of a light cane on the second charge.

By s. 27 (1) of the Penal Code the number of strokes of the cane that may be ordered “shall not exceed twenty four”. This section was repealed by s. 3 of the Criminal Law Amendment Act (3 of 1969) which substituted a new s. 27 which provided in part that:

“a sentence of corporal punishment shall be to receive such number of strokes with a cane as may be specified in the sentence.”

so there is now no over-all restriction on the number of strokes of the cane which may be ordered. The jurisdiction of a senior resident magistrate is to be found in s. 7 of the Criminal Procedure Code, as repealed and a new section substituted by s. 24 of the Magistrate’s Courts Act (17 of 1967) which provides for “corporal punishment not exceeding twenty-four strokes”. By s. 6 of the Criminal Law Amendment Act, s. 7 of the Criminal Procedure Code was amended by inserting after sub-s. (1) a new sub-s. (1A).

“Notwithstanding the provisions of subsection (1) of this section, a subordinate court of the first class held by a senior resident magistrate or a resident magistrate may, on the conviction by such court of any person under section 296, 297, 308 or 322 of the Penal Code, pass any sentence authorised for such offence.”

That is on a conviction under ss. 296, 297, 308 or 322 of the Penal Code a senior resident magistrate is unrestricted in the number of strokes that he can award. We can find no other authority which allows a senior resident magistrate to exceed his general jurisdiction of twenty-four strokes of the cane, with the result that s. 279 (a) of the Penal Code under which the appellant was ordered to receive strokes of the cane, not being one of the four sections referred to in

s. 7 (1A) of the Criminal Procedure Code the sentence of 30 strokes of a light cane was in excess of the magistrate's jurisdiction. This being so the sentence of 30 strokes of a light cane passed on the second charge must be set aside. We consider that under the circumstances of the case a sentence of 24 strokes of the cane would be appropriate.

Sentence varied.

The appellant was absent and unrepresented.

For the respondent:

J. R. Hobbs (Deputy Public Prosecutor)

Mutie v Republic
[1970] 1 EA 400 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	5 February 1970
Case Number:	1201/1969 (74/70)
Before:	Mwendwa CJ and Wicks J
Sourced by:	LawAfrica

[1] Criminal Practice and Procedure – Charge – Conviction of different offence – Substitution only possible after trial and proof of facts – Criminal Procedure Code (Cap. 75), s. 188 (K.).

Editor's Summary

On a plea of guilty of theft a conviction of handling stolen property cannot be substituted as there are no facts proved and no facts are proved without a trial.

Appeal allowed.

No cases referred to in judgment.

Judgment

The judgment of the court was read by **Mwendwa CJ**: In this case the appellant was charged before the Resident Magistrate, Machakos, of stock theft contrary to s. 278 of the Penal Code and of theft contrary to s. 275 of the Penal Code. On the appellant pleading guilty to each charge the magistrate, calling in aid s. 188 (a) of the Criminal Procedure Code, found him guilty in both cases of handling stolen goods contrary to s. 322 of the Penal Code, as amended by s. 5 of the Criminal Law Amendment Act 1969, and

sentenced him to serve a term of imprisonment of 7 years hard labour on each charge, the sentence to run concurrently. He appeals against his conviction and sentence. Mr. Hobbs does not uphold the convictions and we agree with him that they must be set aside.

The relevant part of s. 188 of the Criminal Procedure Code provides:

“When a person is charged with stealing anything and –

- (a) the facts proved amount to an offence under s. 322 or s. 323 of the Penal Code, he may be convicted of that offence although he was not charged with it.”

It is seen that the words employed are “the facts proved . . .”. The application of this element required that there be a trial and the necessary elements constituting an offence under either s. 322 or s. 373 be found as facts on the evidence before the trial court. In this case no such facts were proved.

The result is not based on a technicality. The elements of the offence of handling stolen goods are quite different from those of stock theft or theft and by pleading to a charge of stock theft, or theft, an accused person cannot be

said to have made any admission of the elements of the offence of handling stolen goods, for the plain reason that those elements were not put to him in the particulars of the charges.

In a case such as this should it be considered that the answer by an accused person to charges admits the elements of a charge of handling stolen goods, we see no reason why a charge of handling stolen goods contrary to s. 322 of the Penal Code should not be brought against him. This was not done and the appeal must be allowed.

Appeal allowed.

The appellant was absent and unrepresented.

For the respondent:

J. R. Hobbs (Deputy Public Prosecutor)

Amratlal v Uganda
[1970] 1 EA 401 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	12 March 1970
Case Number:	160/1969 (76/70)
Before:	Duffus VP, Spry JA and Law JA
Sourced by:	LawAfrica

[1] *Criminal Practice and Procedure – Sentence – Enhancement – Accused not heard – Enhancement unlawful – Criminal Procedure Code (Cap. 107), s. 331 (U.).*

Editor's Summary

The appellant was convicted and sentenced to three years' imprisonment. He appealed to the High Court against conviction and sentence but the appeal against sentence was not pursued, nor did the respondent ask for enhancement of sentence. The High Court dismissed the appeal and enhanced the sentence to six years. On further appeal

Held – No sentence may be enhanced without the accused being given an opportunity to show cause against the enhancement (*R. v. Abdul Aziz and another* (1) followed).

Appeal allowed.

Case referred to in judgment:

(1) *R. v. Abdul Aziz and another* (1948), 15 E.A.C.A. 51.

Judgment

The judgment of the court was read by **Law JA:** This is a second appeal. The appellant was convicted, together with others, of stealing goods from a railway train, and was sentenced to three years' imprisonment by the chief magistrate at Tororo. His appeal to the High Court was dismissed, but the judge enhanced the sentence from three to six years' imprisonment. State Attorney had not asked for the sentence to be enhanced, nor had the judge given any indication at the hearing of the appeal that he intended to enhance the sentence, so that the appellant was given no opportunity of being heard on the question of enhancement. The memorandum of appeal to the High Court included a prayer that the sentence be reduced, but according to the record this prayer was not pursued, the appellant's counsel confining his submissions to the grounds of appeal relating to the conviction.

Mr. Patel submitted that no sentence should be enhanced without the accused person being given an opportunity of being heard in opposition. Mr. Mulenga for the Republic pointed out that as the appellant had appealed against sentence

as well as conviction, the question of sentence was in issue, and he referred to s. 331 (2) of the Criminal Procedure Code, which empowers a judge of the High Court, where sitting in an appellate capacity, to enhance a sentence. Mr. Mulenga also referred to s. 337 (1) of the Code, which precludes appeals to this court relating to severity of sentence, and to the proviso to s. 337 (2) of the Code, which preserves this court's power to interfere with sentences which are unlawful. In *R. v. Abdul Aziz and another* (1948), 15 E.A.C.A. 51, this court held that an appeal court should not enhance a sentence without giving the accused an opportunity of showing cause against enhancement. As in the present case, the respondent had not asked for enhancement and neither side was heard on the subject. It is a fundamental principle of natural justice that no person shall be condemned unheard, which is in effect what happened in this case. We allow the appeal against sentence, set aside the sentence of six years' imprisonment passed in the High Court, and restore the sentence of three years passed by the chief magistrate.

Appeal allowed.

For the appellant:

G. K. Patel

For the respondent:

J. N. Mulenga (State Attorney)

Kigoye and another v Uganda
[1970] 1 EA 402 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	12 March 1970
Case Number:	173/1969 (78/70)
Before:	Duffus VP, Spry and Law JJA
Sourced by:	LawAfrica
Appeal from:	The High Court of Uganda – Dickson, J.

[1] Evidence – Circumstantial evidence – Recent possession of stolen property – Presumption rebuttable.

Editor's Summary

The evidence against the second appellant convicted of robbery with aggravation and sentenced to death was the discovery in his house three and a half days after the robbery of a radiogram stolen in the course of the robbery.

The second appellant's story, which the judge did not believe, was that he received the radiogram

from one Luyi. The second appellant's wife supported this story, and a policeman who had gone to arrest the second appellant saw two men near his house, one of whom was Luyi.

Held – The presumption arising out of recent possession of stolen property that the second appellant was one of the robbers was rebuttable. The distinct possibility remained that the second appellant had merely received the radiogram and the second appellant's untruthfulness was not sufficient to justify the conviction of robbery.

Finding and sentence of death set aside and a finding of guilty of receiving and a sentence of six years' imprisonment was substituted.

Cases referred to in judgment:

- (1) *Kantilal Jivraj and another v. R.*, [1961] E.A. 6.
- (2) *Andrea Obonyo v. R.*, [1962] E.A. 542.

Judgment

The judgment of the court was read by **Law JA**: The appellants, together with a third man who was acquitted, were tried in the High Court on a charge of robbery with aggravation, contrary to ss. 272 and 273 (2) of the Penal Code, and in the alternative with receiving or retaining stolen property, contrary to s. 298 (1) of the Penal Code. The robbery in question took place in the house of a Mr. Byaruhanga. About a dozen robbers were involved; several were armed with pangas, which they used to assault Mr. Byaruhanga and his wife, causing them very serious injuries amounting to grievous harm. By s. 273 (2) of the Penal Code, any person convicted of robbery who in the course of the robbery uses or threatens to use a deadly weapon or causes death or grievous harm to any person shall be sentenced to death. This section in its present form was introduced into the Penal Code by the Penal Code (Amendment) Act 1968. Both appellants were convicted on the charge of robbery with aggravation and were duly sentenced to death. They now appeal against conviction and sentence, and we are informed that these are the first appeals from mandatory death sentences passed under the new s. 273 of the Penal Code.

So far as the first appellant is concerned, we are satisfied that there are no merits in his appeal.

The second appellant is in a very different position. The only evidence to connect him with the robbery was the discovery, in his home, three and a half days after the offence, of a radiogram stolen in the course of the robbery. The second appellant immediately claimed that the radiogram had been brought to his house by one Luyi, and he was supported in this by his wife, who was called as a prosecution witness, and to a lesser extent by a defence witness, detective constable Daniel, who deposed that when he went with Sergeant Owundo to arrest the second appellant, he saw two men near the second appellant's house who ran away, one of whom was Luyi. The sergeant also saw these two men, but did not recognize Luyi. The trial judge did not believe the second appellant's explanation, and convicted the second appellant of robbery, applying the presumption arising out of the recent possession of stolen property.

Mr. Mugenyi for the second appellant has argued a number of grounds of appeal, the effect of which amounts to a complaint that the judge was not justified in the circumstances of this case in drawing the inference that the second appellant, by reason of his possession three days after the event of one of the items stolen in the course of the robbery, was guilty of having participated in that robbery, the possibility that he received the article not having been excluded.

The law relating to the presumption arising out of the recent possession of stolen property, where the accused person is charged with murder and it is sought to infer his presence at the scene of the murder from his possession of property stolen at the time of the murder, was fully considered and reviewed by this court in the case of *Andrea Obonyo v. R.*, [1962] E.A. 542. In particular the court quoted with approval the dictum in *Kantilal Jivraj and another v. R.*, [1961] E.A. 6 to the effect that the presumption

“... is merely an application of the ordinary rule relating to circumstantial evidence that the inculpatory facts against an accused must be incompatible with innocence and incapable of explanation upon any other reasonable hypothesis than that of guilt.”

Clearly the same principle must apply to a case where the accused is not simply charged with theft but with an aggravated offence, particularly one carrying the death sentence.

The judge in his judgment referred to *Obonyo's* case, directed himself correctly

on the law and in particular had in mind that a finding that the person in possession of recently stolen goods was the thief should not be made unless the possibility that he received the articles had been excluded. In connection with this aspect, the judge said he did not believe the second appellant's explanation that the radiogram was brought to him by Luyi, and he proceeded to convict him of robbery. He appears to have relied on the appellant's untruthfulness as having sufficient inculpatory effect to make the difference between finding robbery and receiving. But mere rejection of the second appellant's explanation is, with respect, not enough to justify conviction. This does not in itself amount to exclusion of the possibility that the second appellant was a receiver. There is nothing to connect the second appellant with the robbery other than his possession, three days later, of a single stolen item. He was not identified as having been present, nor was he implicated by any confession made by a co-accused; he gave an immediate explanation which, though disbelieved by the judge, could possibly be true, and he has consistently adhered to that explanation. Mr. Mr. Deobhakta who appeared for the Republic informed us that he could not support the conviction of the second appellant for robbery, because in his view the circumstances of this particular case do not render it more likely that the second appellant was the thief and not the receiver, so that the possibility that he received the radiogram cannot be said to have been excluded. We agree. We can see nothing in this case which points with greater force to the second appellant having stolen, as opposed to having received, the radiogram. In these circumstances the possibility that he is a receiver has not been excluded, and he should not be convicted of robbery.

The second appellant's appeal succeeds to this extent: the conviction for robbery contrary to ss. 272 and 273 (2) of the Penal Code is quashed and the sentence of death passed on him is set aside; we substitute a conviction on the alternative charge of receiving a radiogram, having reason to believe the same to have been stolen, contrary to s. 298 (1) of the Penal Code, and impose on such conviction a sentence of six years' imprisonment.

Appeal allowed. Conviction substituted.

For the appellants:

Y. Mugenyi (instructed by *Mugenyi & Co.*, Kampala)

For the respondent:

A. G. Deobhakta (State Attorney)

Yovan v Uganda
[1970] 1 EA 405 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	14 April 1970
Case Number:	21/1970 (85/70)
Before:	Duffus P, Spry VP and Law JA
Sourced by:	LawAfrica

[1] *Criminal Law – Murder – Provocation – Heat of passion – Covers other emotional states than anger – Penal Code, s. 188 (U.).*

[2] *Criminal Law – Murder – Provocation – Threat to kill accused. Whether can be provocation – Penal Code, s. 187 (U.).*

[3] *Criminal Law – Murder – Provocation – Test the standard of an ordinary person of the community of accused.*

Editor's Summary

The appellant suspected the deceased, his step-mother, of having killed his children by witchcraft or poison. On his blaming her, she replied that he would die before he could bury his children. He then cut her about the head causing her death. It appeared from the statement made by him that he armed himself intending to kill her for killing his children. The trial judge rejected the defence of provocation and sentenced the appellant to death.

Held –

- (i) a threat to cause the death of the accused may amount to provocation, depending on the circumstances (*Eria Galikuwa v. R.* (1) considered);
- (ii) provocation must be judged by the standard of an ordinary person of the community to which the accused belongs (*Chacha s/o Wamburu v. R.* (2) followed);
- (iii) the heat of passion required by s. 188 refers not only to a state of anger but to any emotional state caused by the provocation and which is such as to deprive an ordinary person of self-control;
- (iv) the judge's finding that there was no legal provocation was correct on the facts.

Appeal dismissed.

Cases referred to in judgment:

- (1) *Eria Galikuwa v. R.* (1951), 18 E.A.C.A. 175.
- (2) *Chacha s/o Wamburu v. R.* (1953), 20 E.A.C.A. 339.

Judgment

The judgment of the court was read by **Duffus P:** This is an appeal from a conviction for murder. The only question on the appeal was whether the trial judge had correctly dealt with the defence of provocation.

Two of the appellant's children suddenly died and the appellant suspected that the deceased, an elderly woman and his step mother, had killed the two children either by witchcraft or poison, and on apparently the same day he went to the deceased in her house and blamed her for the death of his children. The deceased did not deny the allegation but said to the appellant that he also would die before he could perform the funeral ceremony for his two children. The appellant in his unsworn statement at the trial said he got annoyed at this stage and cut the deceased on her head and she then fell into her fireplace. The

deceased's hut then caught fire and was completely burnt with the deceased inside. The deceased died from the injury to her head and from extensive burns both inflicted or caused by the appellant, either of which injuries would in any event have caused her death.

The defence of provocation is dealt with in ss. 187 and 188 of the Penal Code and has also been the subject of numerous earlier decisions of this court. In considering this case the trial judge to a large extent relied on the principles relating to provocation as explained by this court in the case of *Eria Galikuwa v. R.* (1951), 18 E.A.C.A. 175 and, having held that the substantive act of provocation here was a threat to cause the appellant's death, said, following that decision, that "a threat to cause death cannot be considered as a physical provocative act". With respect we are of the view that the decision in the *Galikuwa* case should not be regarded as laying down a general rule but must be interpreted with reference to the facts of that case. There may be cases where a threat to kill taken with the other existing circumstances could amount to legal provocation.

It is important that each case must be considered on its own facts and the law as set out in s. 187 of the Penal Code applied to those facts. In applying these provisions the provocation must be considered and judged by the standard of an "ordinary person", and "ordinary person" means here an ordinary person of the community to which the accused person belongs. In this respect we would quote the following passage from the judgment of this court in *Chacha s/o Wamburu v. R.* (1953), 20 E.A.C.A. 339 at p. 346:

"The final paragraph of s. 202 of the Tanganyika Code reads 'for the purposes of this section the expression "an ordinary person" shall mean an ordinary person of the community to which the accused belongs'. This does no more than declare the common law rule, which applies for example in Kenya where no such paragraph appears."

The definition applies with equal force to Uganda where there is no statutory definition of an "ordinary person". Thus what might be a deadly insult to a member of one community might be a mere triviality to members of another community. In this respect the opinion of the assessors with their local knowledge of the customs of the people of the community can be of the greatest assistance to the trial judge although, of course, evidence can, and should (if necessary) be led as to the nature and meaning of a particular wrongful act or insult and as to any relevant customs.

With this in mind we would again shortly summarise the provisions of ss. 187 and 188. The essentials as set out in s. 188 are that there must be:

- (i) A wrongful act or insult, and as stated in subsection (3) it cannot be a lawful act;
- (ii) it must be such an act or insult as to deprive an ordinary person of his self control;
- (iii) and such as to induce him to commit an assault of the kind which he did upon the person offering the insult;
- (iv) the assault must be committed on or at least aimed at the person offering the provocation.

Section 187 only applies to those cases which would be murder but for the provisions of that section and requires that the act of assault be done in the heat of passion caused by sudden provocation as defined in s. 188 and before the passion thus aroused has had time to cool. It has been suggested in some of the previous cases that heat of passion refers only to a state of anger. We

think that this might be too narrow an interpretation; the intention of the section is to denote an emotional state which has been caused by the act of the person assaulted and is such as to deprive an ordinary person of self control. Clearly it must be a retaliatory act that has developed as a result of the wrongful act or insult. In certain circumstances it would be difficult to say if an appellant acts partly in desperation or in sudden fear or whether he acts wholly in anger. The main element is the sudden reaction which causes such an overpowering emotion as to deprive the appellant of self control.

In this case the facts as what actually occurred largely depend on the appellant's various accounts as to what took place. In his statement to the police he said he killed the deceased because she had kill 1 his children and he made similar statements to the third prosecution witness, Andereya Sambili, a Mukungu chief to whom he surrendered himself, and to the fifth prosecution witness Erifazi Mbatalali a Gombolola Chief who was in prison on remand at the same time as the appellant, but in an unsworn statement in his defence at the trial he gave a slightly different account. In this account, which was rejected by the judge, he again blamed the deceased for causing the death of his two children, and said he went to the deceased's house and there accused her and suggested she went away, but that the deceased then followed him and threatened he would also die before he could perform the funeral ceremony for his children, and that it was at this stage that he became annoyed and cut her.

On these facts one of the assessors advised that there was not sufficient provocation but the other assessor found that there was sufficient provocation to warrant a conviction for manslaughter.

This is a difficult case because the act of the deceased in threatening to cause the death of the appellant, presumably by witchcraft, must be viewed not in isolation but in the context of the appellant's children having just died, the appellant honestly believing the deceased to have been responsible for their deaths, and the deceased knowing of this belief. We are unable to say that the uttering of such threats by the deceased, in these circumstances, could never constitute a wrongful act and thus legal provocation.

In this case, however, it does appear from the evidence that the appellant, when he armed himself with his panga and went to the deceased's house intended to kill her, and that his statement to the police and to his co-prisoner that he killed her because he believed that she had killed his children was correct. We agree with the trial judge that this belief alone could not amount to provocation sufficient in law to reduce the killing of the deceased from murder to manslaughter.

The judged in a carefully considered judgment and after reviewing all the facts decided that the various acts of the deceased were not sufficient to form legal provocation, and after full consideration of all circumstances we are of the view that the learned judge came to a correct decision.

The appeal is dismissed.

The appellant appeared in person.

For the respondent:

V. M. Patel (State Attorney)

Division: High Court of Kenya at Nairobi
Date of judgment: 4 January 1970
Case Number: 794/1968 (83/70)
Before: Harris J
Sourced by: LawAfrica

[1] *Factory – Dangerous machinery – Duty to fence – Strict duty – Difficulty of fencing no defence – Factories Act (Cap. 514), s. 23 (1) (K.).*

[2] *Factory – Dangerous machinery – Duty to fence – Whether unlikely accident foreseeable.*

[3] *Factory – Dangerous machinery – Contributory negligence – Workman taking risk created by breach of duty – Whether contributory negligence.*

[4] *Damages – Personal injuries – Quantum – Hand – Loss of three fingers of right hand.*

[5] *Statutory duty – Breach – Contributory negligence – Workman taking risk created by breach of duty.*

Editor's Summary

The plaintiff claimed damages from the defendant, his employers, in respect of injuries suffered by him when his hand was drawn into the rollers of a tyre-retreading machine by the material with which he was working.

The claim was made under s. 23 (1) of the Factories Act and in negligence and the defendants pleaded contributory negligence on the part of the plaintiff.

There was no fencing designed to prevent the operator's hand from being drawn between the steel rollers of the machine although there was a bar at head height above the machine which could be operated to cut off the electric power to the rollers.

It was conceded by the defendants that the rollers were a dangerous part of the machinery, but they contended that fencing would interfere with the operation of the machine and that they need only fence against foreseeable risks, the present accident not being foreseeable.

The plaintiff was paid Shs. 195/- a month and had been kept in the employment of the defendants since the accident. He was right-handed and he lost the whole of three fingers on his right hand, the remaining thumb and little finger having lost much of their function.

Held –

- (i) the dangerous part of the machinery was unfenced or insufficiently fenced;
- (ii) the duty imposed was strict and could not be avoided by showing that compliance would render the machine unusable or difficult to use (*John Summers & Sons Ltd. v. Frost* (3) followed);
- (iii) that the accident was unlikely and that similar accidents were infrequent did not make the present accident unforeseeable (*Burns v. Joseph Terry & Sons Ltd.* (2) considered);
- (iv) that a workman has taken a risk created by the employer's breach of statutory duty does not

amount to contributory negligence if the risk is one a reasonably prudent man would have taken (*Flower v. Ebbw Vale Steel, Iron & Coal Co., Ltd.* (1) considered);

- (v) the plaintiff would be awarded general damages of Shs. 20,000/-.

Judgment for the plaintiff.

Cases referred to in judgment:

- (1) *Flower v. Ebbw Vale Steel, Iron & Coal Co., Ltd.*, [1934] 2 K.B. 132.
- (2) *Burns v. Joseph Terry & Sons Ltd.*, [1951] 1 K.B. 454.
- (3) *John Summers & Sons Ltd. v. Frost*, [1955] A.C. 740.
- (4) *Kanji and Kanji v. R.*, [1961] E.A. 411.

Judgment

Harris J: This is an action by the plaintiff claiming damages for injuries suffered by him when, on 6 April 1967, one of his hands was caught and severely crushed in a machine which he was operating in the course of his employment by the defendants at their premises in Nairobi.

The defendants carry on in their premises the business of re-treading motor vehicle tyres, for which purpose they have installed a number of machines each containing a pair of movable rollers. The plaintiff, at the time of the accident, was employed as an operator of one of these machines and was so engaged when he received the injuries.

The claim is based primarily upon an allegation that the defendants were in breach of their statutory duty under the Factories Act (Cap. 514), to fence the rollers, with an alternative claim based on negligence and breach of common law duty. The defendants in their amended statement of defence concede that the premises in which the accident occurred constituted a factory within the meaning of the Act; that at all material times the plaintiff was employed there by them; and that his duties included feeding new rubber and rubber strips into the rollers, mixing the necessary ingredients therein, and cutting off the rubber strips with a knife and feeding them back into the rollers. They concede also that on the day of the accident the material in the machine, being sticky and gluey, hampered the finger and hand manipulation of the plaintiff. The defendants deny any negligence or breach of duty, statutory or otherwise, on their part and allege contributory negligence on the part of the plaintiff.

The statutory duty of which the defendants are alleged to have been in breach is set out in s. 23 (1) of the Factories Act in the following terms:

“23(1) Every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced:

Provided that, in so far as the safety of a dangerous part of any machinery cannot by reason of the nature of the operation be secured by means of a fixed guard, the requirements of this subsection shall be deemed to have been complied with if a device is provided which automatically prevents the operator from coming into contact with that part.”

At the request of the parties and in the presence of their counsel I visited the premises during the course of the hearing and was permitted to and did examine the particular machine by which the plaintiff was injured and which, it was agreed, was in the same condition when I saw it as it had been at the time of the accident. I was also shown on the premises a number of similar machines of varying sizes and designs containing rollers, some of them in motion and all used in connection with the defendants’ business of re-treading tyres. In addition there was demonstrated for me the precise manner in which the plaintiff had

been operating his machine and the way in which his injuries were caused.

It was rightly conceded by the defendants during the course of the hearing (and had it not been I would undoubtedly have so held) that the rollers were

“dangerous”, which must be taken to mean that they constituted a “dangerous part” of the machinery within the provisions of sub-s. (1) of s. 23 of the Act and attracted the operation of that subsection. It is clear that no device was provided which automatically prevented the operator from coming into contact with the rollers and therefore that the proviso to the subsection has no application. Accordingly, the issues for determination, apart from damages, are:

- (1) was the obligation as to fencing imposed upon the defendants by that subsection sufficiently complied with?
- (2) was the plaintiff guilty of contributory negligence?

It is necessary at this point to consider in some detail the nature and design of the machine on which the plaintiff was working and the process upon which he was engaged. The machine is both a rolling machine and a mixer, and it consists in the main of two steel rollers, each of approximately two feet in length and one foot in diameter, placed side by side in a horizontal position, and driven by an electric motor so that they revolve fairly slowly in converse directions, that is, towards each other as viewed from above. In addition, they are capable of being heated internally by steam.

The process employed is, briefly, that crude rubber in slabs is inserted between the rollers as they are revolving and is thereby subjected to pressure, the effect of which is to make the rubber pliable. Steam heat is then applied through the rollers which induces in the rubber a sticky and porous state at which stage certain chemicals are added which, as a result of further rolling, become absorbed into the rubber. During the final stages of this process the sticky state of the rubber mass produces a tendency in it to adhere to the rollers, and to combat this the operator is required continuously to cut the adhered rubber with a knife by hand along the surface of the roller nearest to him, peel it off, and feed it back in between the rollers from the top.

There was what might be termed a safety bar running horizontally across the machine parallel to but above the rollers at about the level of the operator’s head, the purpose of which was to enable him to cut off the electric power driving the rollers should he so desire. This bar did not prevent and was clearly not intended specifically to prevent the operator’s hand from being inserted or dragged between the rollers as they turned save that it provided a means whereby the operator, if he saw that this was likely to occur, could shut off the power and thereby bring the movement of the rollers to a halt. In one of the other machines in the factory a device had been fitted which, it was said, would have precluded the possibility of an accident such as befell the plaintiff from occurring, and it appears that after the accident a similar device was fitted on the particular machine with which this case is concerned.

The plaintiff in his evidence, which I accept, said that on the day of the accident he was working at the machine, his duty being to operate it to keep cutting off the rubber strip as it formed and hung down from the revolving roller nearest to him, and to feed the rubber back at the top of the rollers. For this purpose he used both hands, working the machine and cutting the rubber with a knife which he held in his right hand while holding the rubber with his left hand, and then using both hands in feeding back the rubber on to the top of the rollers. As he was doing this a portion of the rubber came on top of his right hand, sticking to it and causing it to be dragged up over the top and caught between the rollers. He could not say why it had stuck to his hand but thought that had there been a guard over the rollers the accident would not have occurred. The crushing of his hand, he said, happened suddenly and, jumping up, he apparently hit the safety bar with his forehead, causing the electric power, to his surprise, to be cut off, and it would seem that he was unaware, or had forgotten, that that was the purpose of the bar.

An engineer named Barber, who was called as a witness by the plaintiff, explained the manner in which such a machine is operated, expressed the opinion that this particular machine was clearly dangerous, and suggested a number of improvements which could have been made to it to remove or lessen the element of danger. He agreed that there were other similar machines in use elsewhere in Nairobi which were likewise dangerous and, when shown an illustrated trade advertisement for such a machine manufactured in Italy, said that in his view the makers must have intended that a sufficient measure of protection would be added when the machine is being fitted up for use. He did not think that the present machine would have been rendered inoperative or have had its speed of action reduced by the addition of proper safeguards.

The defendants called as a witness a Mr. Pockett, who is an employee of a company known as Car and General (Kenya) Ltd. which carries on in Nairobi inter alia the business of re-treading tyres. He said that he has had twenty years' experience with machines of this nature, that the machine by which the plaintiff was injured was a standard average machine similar to those used by his firm, that some of the improvements suggested by Mr. Barber would interfere with the easy operating of the machine, and that the safety bar which it already had was normal and, in his opinion, quite adequate. In cross-examination he agreed that all these machines are dangerous and should be fenced, that they all could have protective bars fitted, and that the protective bar which was afterwards fitted to the machine which injured the plaintiff might, had it been fitted at the time, have prevented the accident.

Mr. Bhamra, the managing director of the second defendant, agreed that, except for the safety bar at head level, the rollers were unprotected, but he thought that no form of protection would prevent the operator from putting his hand between the rollers if he wished to do so.

The Factories Act was passed in the year 1950 and there can be no doubt that its provisions are taken largely from those of the Factories Act 1937, of the United Kingdom. Indeed the language of s. 23 (1) is identical to that of s. 14 (1) of the Act of 1937 to which I will have occasion later to refer. A considerable number of authorities on the effect of this provision were relied upon by counsel in their careful arguments, all of which I have considered, but I do not find it necessary to refer to more than three of them.

In *John Summers & Sons Ltd. v. Frost*, [1955] A.C. 740, the House of Lords, in dealing with a claim under s. 14 (1) of the Act of 1937, held that the duty thereby imposed is absolute and that the subsection is not to be read as if it contained a qualification so limiting the obligation to fence as to permit the factory-owner to avoid it merely by showing that strict compliance with it would render the machinery unusable. On the evidence and from my inspection of the machine in the present case I am satisfied that the rollers were either totally unfenced or quite inadequately fenced, depending upon whether the safety bar could be regarded as a measure of fencing, and the effect of *Summers'* case is to preclude the defendants from relying upon a consideration such as the difficulty which might be found in operating the machine if it had been properly fenced.

The defendants relied upon the decision of the Court of Appeal in England in *Burns v. Joseph Terry & Sons Ltd.*, [1951] 1 K.B. 454, and submitted that the accident to the plaintiff could not reasonably have been foreseen and therefore, since the degree of fencing required by the Act is limited to fencing against foreseeable risks, the defendants are not liable. It is clear that the effect of *Burns* case is to prescribe as the proper criterion what Somervell, L.J. (as he then was) there called "the test of reasonable foreseeability", which may be applied by putting the question: "Was the machinery securely fenced having regard to circumstances which could reasonably have been foreseen?" This raises an

issue of fact, and I hold without hesitation that in the present case it must be answered in the negative for no serious attempt had been made to prevent the occurrence of the very accident which in fact occurred and which, in my opinion, must always have been reasonably foreseeable as a practicable possibility. It is not sufficient for the defendants to say that the accident was inherently unlikely or to point to the infrequency with which similar accidents had occurred in the past. They rightly admit that the rollers constituted a dangerous part of the machinery and in my view, having seen the machine, the only obvious and substantial danger which can be attributed to it is the danger that a person may have his hand or arm crushed between the rollers. I can see no other danger, and this is the specific danger into which the plaintiff ran. The protection which was required was therefore protection against this particular hazard and, since such protection was either completely absent or quite ineffective, it follows that, on the test of reasonable foreseeability, the machine was neither securely fenced nor otherwise made as safe to the employees and workers as if it had been securely fenced.

It would appear that there is no reported decision of the courts of this country upon the question raised here but counsel referred me to the case of *Kanji and Kanji v. R.*, [1961] E.A. 411, which was a second appeal from a conviction in a district court in Tanganyika of an offence under the corresponding legislation in that Territory and in which both *Summers'* case and *Burns'* case were followed and applied. Although not concerned with a civil claim such as the present, that decision lends support to the conclusion at which I have arrived that, subject to the question of contributory negligence, the plaintiff's claim must succeed.

The issue of contributory negligence, like that of foreseeability, is primarily one of fact and it is appropriate to bear in mind the dictum of Lawrence, J. (as he then was) in *Flower v. Ebbw Vale Steel, Iron & Coal Co. Ltd.*, [1934] 2 K.B. 132, at p. 140, which has been approved in the House of Lords on a number of occasions, where he said:

"I think, of course, that in considering whether an ordinary prudent workman would have taken more care than the injured man, the tribunal of fact has to take into account all the circumstances of work in a factory and that it is not for every risky thing which a workman in a factory may do in his familiarity with the machinery that a plaintiff ought to be held guilty of contributory negligence."

In the present case the plaintiff stated in evidence, and it was not denied, that his hand was dragged into the machine by reason of the piece of rubber, which was in the course of being fed into the rollers, having fallen back on his hand and become in a measure adhered to it. He was unable to give any explanation of why this should have happened and not unnaturally he denied that he had put his hand between the rollers deliberately. He agreed that the rubber with which he was working was of the same type as that which he had been using for several years previously, that the chemicals which were being used were correct, and that the mixture was the same as usual. At the time of the occurrence he was thirty-eight years of age and had been employed by the defendants since the year 1964, working on this particular machine since about May 1965, that is, for nearly two years. Prior to that he had been employed in a bakery and later in a brewery but the nature of his work there was not disclosed. He appeared to be of a somewhat limited intelligence though no doubt the work on which he was engaged at the time of the accident was well within his competence.

It is for the defendants to establish contributory negligence and the facts here are not as strong against the plaintiff as were those in *Summers'* case (*supra*). There a fitter with twenty-five years' experience, in working with a revolving grindstone, allowed his finger to come into contact with the stone despite the

presence of a protective shield, and Lord Keith of Avonholm, who was a member of the majority of the Law Lords hearing the appeal, said [1955] A.C. at p. 777:

“There remains the question of contributory negligence. It is for the appellants to prove this against the workman. In my opinion, they have failed to do so. The type of accident that happened here is just the type of accident against which s. 14 is directed. There is no question here of disobedience to orders, or of reckless disregard by a workman of his own safety. At most there was a mere error of judgment by the plaintiff as to how the work on which he was engaged could best be carried out, and possibly only a mere momentary inadvertence.”

Although it is not necessary for a defendant, seeking to support a plea of contributory negligence, to show an actual breach of duty on the part of the plaintiff, the fact that the latter may have taken a risk created by the negligence or breach of statutory duty of the defendant does not amount to contributory negligence if, as is said in *Charlesworth on Negligence* (4th Edn.) at p. 514 (para. 1108), the risk is one which a reasonably prudent man in the plaintiff's position would take. No doubt the present plaintiff may be said to have taken some slight risk in operating the machine without insisting on the provision by the defendants of proper safeguards but I think his blameworthiness was limited, at the most, to the taking of that risk and, in the circumstances, did not amount to contributory negligence upon which the defendants can rely for the purpose of this case.

For these reasons I find that the defendants were guilty of a breach of the statutory duty imposed upon them by s. 23 (1) of the Act, that the plaintiff was not guilty of contributory negligence, and that the plaintiff is entitled to damages.

The special damages claimed, amounting to Shs. 1,553/-, were admitted and it remains only to consider the question of general damages. The plaintiff has lost the index, middle and ring fingers of his right hand, each having been amputated at its root. The two remaining fingers of that hand, that is, the thumb and the little finger, were also injured, the former having since largely healed save for a slight shortening and loss of function in that it cannot touch the palm, and the little finger having become stiff in a very bent position and so that it now possesses no movement except at the root. It was suggested by the defendants that this little finger might be strengthened by an operation in plastic surgery but this proposition was not established. I am satisfied that the plaintiff, who is stated to have been right-handed prior to the accident, has suffered a very significant loss of function in that hand, that he will never again be able to do the work of a machine operator as before, and that the hand is now permanently to a very large extent out of action. This all results in a substantial loss of earning power and a considerable measure of inconvenience. Since his accident and up to now he has been kept on in the employment of the defendants, primarily, it would seem, as a gesture of kindness, but there can be no certain future in this as his usefulness to them is manifestly much reduced. His rate of remuneration at the date of the injury has not been stated but since that time he has been paid Shs. 190/- per month which possibly is the same as when he was injured. In addition he must clearly have suffered pain and discomfort and this, he says, still continues to some degree.

I measure the general damages at Shs. 20,000/-, which, together with the agreed special damages, comes to Shs. 21,553/-. From this amount there is to be deducted the sum of Shs. 3,744/- already paid to the plaintiff by the defendants or one of them under the Workmens Compensation Act and for which it is agreed the plaintiff must give credit. There will therefore be judgment for the

plaintiff against the defendants, jointly and severally, for the sum of Shs. 17,809/- with interest thereon at 6 per cent per annum as from this date until payment, together with the costs of the suit when taxed.

Judgment for the plaintiff.

For the plaintiff:

G. S. Vohra

For the defendants:

H. P. Makhecha (instructed by *Makhecha & Co.*, Nairobi)

Lukenya Ranching and Farming Cooperative Society Ltd v Kavoloto
[1970] 1 EA 414 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	7 May 1970
Case Number:	35/1969 (86/70)
Before:	Duffus P, Law and Lutta JJA
Sourced by:	LawAfrica

[1] *Co-operative Societies – Arbitration – Dispute between Society and employee who is also a member – Not for arbitration – Co-operative Societies Act (Cap. 490), s. 55 (K.) – Co-operative Societies Act 1966, s. 80 (K.).*

[2] *Damages – Mitigation – Dismissal – No evidence employment available – No attempt to find employment – Whether damages can be awarded.*

Editor's Summary

The appellant, a co-operative society, registered under the Co-operative Societies Act, employed the respondent as a manager. The respondent was also a member of the society. The agreement did not provide for leave, nor did it specify the period of notice required for its termination. The respondent was dismissed and paid one month's salary in lieu of notice. After dismissal the respondent returned to his own farm which was near that of the appellant. There was no evidence that there was suitable alternative employment for the respondent in that area.

The respondent sued for damages for failure to give proper notice and in respect of leave not taken. The appellant argued that the court had no jurisdiction to hear the claim. The High Court held that it had jurisdiction to hear the claim, that the respondent was entitled to three months' notice, and was entitled to 21 days leave a year. The appellant appealed.

Held –

- (i) dispute in the Co-operative Societies Act, s. 55 (1) means no more than a controversy or quarrel;
- (ii) the dispute was between the appellant and the respondent as an employee of the appellant, and not as a member;
- (iii) the court therefore had jurisdiction to hear the claim;
- (iv) the respondent had been wrongfully dismissed and was entitled to damages;
- (v) (by Duffus, P. and Lutta, J.A., Law, J.A. dissenting) the question of the failure of the respondent to obtain alternative employment was before the trial judge and his award of damages would not be interfered with.

Appeal dismissed.

Cases referred to in judgment:

- (1) *Flint v. Lovell*, [1935] 1 K.B. 354.
- (2) *Davies v. Powell Duffryn Associated Collieries Ltd.*, [1942] A.C. 601.
- (3) *Nance v. British Columbia Electric Ry. Co., Ltd.*, [1951] A.C. 601.
- (4) *P. R. Patel v. Lockyer and another*, [1951] 24 K.L.R. 24.

(5) *Southern Highlands Tobacco Union Ltd. v. David McQueen*, [1960] E.A. 490.

(6) *Henry Hidaya Ilanga v. Manyena Manyoka*, [1961] E.A. 705.

(7) *Haria Industries v. P.J. Products Ltd.*, [1970] E.A. 367.

The following considered judgments were read:

Judgment

Lutta JA: The appellant, a co-operative society registered under the Co-operative Societies Act (Cap. 490), now repealed and replaced by the Co-operative Societies Act 1966, employed the respondent, under an oral agreement made at Machakos in August 1963, as a manager of their Lukenya ranch, at a salary of Shs. 700/- per month, which was subsequently increased to Shs. 1,000/- per month. The oral agreement did not provide for leave for the respondent nor did it specify the period of notice necessary to terminate the services of the respondent. For the sake of convenience I shall refer to Cap. 490 as “the old Act” and Act 39 of 1966 as “the new Act”.

On 3 July 1966 the appellant wrote to the respondent suspending him from his duties as manager of the society. On 25 July 1966 the appellant wrote to the respondent giving him notice of termination of his services with effect from 1 August 1966, and giving him one month’s salary in lieu of notice. The reasons for the suspension were stated in the letter of 3 July 1966 as being “The loss of 20 gallons of petrol, theft of 4 gallons petrol, and theft of Shs. 20/- being the price of ghee, and abuse of office as manager by improper use of society’s petrol”.

The respondent wrote on 4 July 1966 denying the allegations contained in the letter of 3 July 1966, and on 8 July 1966, the respondent’s advocates wrote to the appellant disputing the validity of the respondent’s suspension from his duties, and demanded an unconditional apology with a substantial offer of payment of damages within three days. The appellant never replied to that letter.

The respondent filed a plaint on 15 September 1966 in the High Court against the appellant claiming general damages for wrongful dismissal or in the alternative Shs. 6,000/- as compensation in lieu of notice and Shs. 1,400/- in lieu of leave. A preliminary point was taken on behalf of the appellant that the Court had no jurisdiction to hear the claim by reason of s. 80 (1) (b) of the new Act. The trial judge held that the court had jurisdiction to hear the claim.

At the hearing both counsel framed and agreed the following issues:

- (i) was the plaintiff wrongfully dismissed?;
- (ii) what length of notice of termination of service was the plaintiff entitled to?;
- (iii) what amount of damages was he entitled to?;
- (iv) was he entitled to any leave?;
- (v) did he take any leave?; and
- (vi) if not, was he entitled to any cash in lieu of leave? If so how much?

The trial judge gave answers to the issues agreed as follows:

- (i) yes;
- (ii) three months’ notice;

- (iii) Shs. 2,000/-;
- (iv) yes;
- (v) yes, 48 days; and

(vi) he was entitled to Shs. 1,400/-, and gave judgment for Shs. 3,400/-.

Against that decision the appellant has appealed to this court.

The first ground of appeal is that the trial judge did not have jurisdiction to hear the respondent's claim in view of s. 55 of the old Act which was in force when the cause of action arose. Counsel for the appellant has argued before us that s. 55 (4) and (5) of the old Act has taken away the jurisdiction of the court and thus the respondent should have referred the dispute to the Commissioner. Counsel further argued that the cause of action arose and the plaint and defence were filed during the operation of the old Act and therefore the appellant had vested in him the right to have the dispute determined as provided for in that Act. Counsel submitted that there was thus a vested right which could not be taken away by a procedural Act. Counsel further submitted that the respondent was an officer of the society and as such there was an obligation on him to refer the dispute to the Commissioner; this obligation could not be taken away for statute. Counsel referred to Maxwell on Interpretation of Statutes (11th Edn.), pp. 204, 206 and 212, and to a number of cases, both English and local.

In my view, it is necessary to answer the question whether there was a dispute and if so, whether the dispute was between the parties specified in s. 55 (1) of the old Act and s. 80 (1) of the new Act and which of these two Acts applied to the dispute.

The word "dispute" is not defined in either Act nor is it a term of art. It must therefore be given its primary or ordinary meaning. Thus it would mean no more than "a controversy" or "a quarrel". There can be no doubt that there was a dispute between the appellant and the respondent. However, for that dispute to be adjudicated upon by the Commissioner, it must be between the parties specified in paras. (a), (b) and (c) of s. 55 (1) of the old Act and s. 80 (1) of the new Act which read as follows:

"55(1) If any dispute touching the business of a registered society arises –

- (a) among members, past members and persons claiming through members, past members and deceased members; or
- (b) between a member, past member or persons claiming through a member, past member or deceased member, and the society, its committee or any officer of the society; or
- (c) between the society or its committee and any officer of the society; or"

"80(1) If any dispute concerning the business of registered society arises –

- (a) among members, past members and persons claiming through members, past members and deceased members; or
- (b) between members, past members or deceased members, and the society, its committee or any officer of the society; or
- (c) between the society or its committee and any other registered society,

it shall be referred to the Commissioner."

In other words, the dispute to which the above paragraphs apply must be between the society and a person in his capacity as a member or person who is an officer of the society. The word "officer" is defined in s. 2 of the old Act as follows – "includes a chairman, secretary, treasurer, member of committee, or other person empowered under any rules made under this Act or by laws of a registered society". In the new Act the definition has been extended to include the words "employee or other person . . .". There was no evidence that the

respondent was “an employee or other person” empowered under any rules made under the Acts in question, or by-laws of a registered society, to give directions in regard to the business of a registered society. It is thus clear that the respondent was not an officer within the meaning of the definition of “officer” in s. 2 of either Act, and as he was suing as an ex-employee, his membership of the society was merely coincidental. In my opinion, the dispute was not one to which s. 55 (1) of the old Act or s. 80 (1) of the new Act would apply. It follows that neither Act applied to this dispute. Thus the Court had jurisdiction to hear the respondent’s claim. I consider that the first ground of appeal must fail.

Turning now to the second and third grounds of appeal, counsel for the appellant did not wish to address us on these grounds although he submitted that there was conflicting evidence on both sides. Counsel did not point out to us the aspects of the evidence he considered were conflicting nor did he indicate the effect of conflict, if any. I do not agree that the evidence was conflicting and I see no reason to differ from the findings of the judge. I am of the opinion that there was no conflict in the evidence and the judge was, on the evidence before him fully justified in his conclusion.

The next question in the appeal is whether the respondent suffered any damage and whether one month’s notice of termination of services was reasonable notice in view of the circumstances. Counsel for the appellant has argued that as the respondent failed to prove that he has suffered any damage directly attributable to the wrongful dismissal by the appellant, he is entitled to no damages or at the very most, he can claim nominal damages only, and that anyhow, it was his duty to do what he could to mitigate his loss. The respondent as I understand it, as manager of the appellant society, was in charge of the society’s ranch of about 58,000 acres in Machakos, and has his farm near that ranch. After his services were terminated he went to work on his farm. It was clearly the respondent’s duty to seek and accept employment after his dismissal. However, if he obtains employment anywhere other than in Machakos, he will certainly suffer loss or incur expenditure which ought, in my view, to be set-off against his remuneration in that employment. In this event, the respondent is certainly entitled to be indemnified in respect of that loss, unless the appellant can prove that the respondent could have obtained suitable employment in Machakos. The burden of proving that suitable other employment was available to the respondent lay on the appellant and failure to discharge that burden would result in the benefit of the doubt going to the respondent (*Southern Highlands Tobacco Union Ltd. v. David McQueen*, [1960] E.A. 490). With regard to the failure by the respondent to prove his pecuniary loss or damage suffered, the law has been laid down by this court that where a plaintiff claims general damages, while he does not have to prove the specific amount suffered or lost, or does not lead some evidence which would assist the court in assessing the damages, he cannot complain if the amount actually awarded by the court is not sufficient to compensate him for any loss which he has actually suffered – (see *Haria Industries v. P. J. Products Ltd.*, [1970] E.A. 367. The judge found that the respondent was entitled to Shs. 2,000/- as damages but did not state how he arrived at that figure. However, it would appear that having held that reasonable notice would be three months and taking into account the payment of Shs. 1,000/-, being one month’s salary in lieu of notice already made to the respondent it can be presumed that the figure of Shs. 2,000/- is the three months’ salary less the one month’s salary. The question is whether the amount of Shs. 2,000/- awarded by the judge is so inordinately high as to be a wholly erroneous estimate of the damage. I do not think so, having regard to the factors the judge took into account. In considering this question, this court

would apply the principles laid down by the Privy Council in the case of *Nance v. British Columbia Electric Railway Co. Ltd.*, [1951] A.C. 601, which were later applied by this court in the case of *Henry Hiday Ilanga v. Manyena Manyoka*, [1961] E.A. 705. The principles were stated as follows:

“The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (*Flint v. Lovell*, [1935] 1 K.B. 354), approved by the House of Lords in *Davies v. Powell Duffryn Associated Collieries Ltd.*, [1942] A.C. 601.”

This figure would appear to be nominal bearing in mind that the respondent was holding a responsible post with the society. In my view the amount of Shs. 2,000/- is not so high as to justify interfering with it.

In his grounds of appeal the appellant has raised, in the alternative, the question of the one month's notice, in lieu of which the respondent was paid salary. The appellant has stated that the one month's notice in lieu of which the appellant had already paid to the respondent a salary was a reasonable notice in view of the circumstances. Can it be said that both the appellant and respondent were cognisant of the existence of usage among employers and employees in agriculture in Kenya that where an employee is paid monthly he is entitled to a month's notice or reasonable notice and that if he is wrongfully dismissed he is entitled to a month's salary in lieu of the month's notice or salary in lieu of the reasonable notice, as damages, and also can it be presumed that the oral agreement between the parties was made with reference to that usage? If the usage exists then the parties would be bound by it notwithstanding their ignorance of its existence. However, if usage is relied on its existence must be established, that is, the usage must be known, certain, uniform, reasonable and not contrary to law. There was no proof of the existence of such a usage. In my view, however, failure to prove such a usage would not deprive the respondent of his entitlement to a reasonable period of notice, as he was paid salary on a monthly basis. I am therefore unable to say that the judge was wrong in holding that reasonable notice would be three months and for that reason the fourth ground of appeal must accordingly fail.

With regard to the fifth and sixth grounds dealing with the question of the respondent's entitlement to leave, counsel for the appellant urged that there was no agreement regarding leave for the respondent and that there was no evidence that the appellant had granted the respondent 52 days leave or any number of days at all. I cannot agree. There was sufficient evidence to support the judge's finding. Francis Muthiani the Vice-Treasurer of the appellant society admitted that they (Managing Committee) had agreed that the respondent “could go on local leave for 21 days” and that the respondent took 52 days instead of 48 days. The respondent stated in evidence that Ndeti was asked to find out how much leave he – the respondent – was to be given and that he was told that he would be entitled to 30 days and actually took 48 days from 1 February 1966 to 20 March 1966. It is quite clear that while the judge believed the respondent's evidence on this point he disbelieved that of Francis Muthiani, the appellant's witness, and in my opinion the reason for his disbelief is quite sound. I can

see no valid reason for interfering with the learned judge's finding and the fifth and sixth grounds fail.

I would dismiss this appeal, with costs.

Duffus P: I have had the advantage of reading the judgment of Lutta, J.A., in draft.

The Co-operative Societies Act (Cap. 490) was repealed and re-enacted in 1966. I agree with Lutta, J.A. that the court has not been deprived of jurisdiction in this type of case either by the provisions of the old Act nor by those contained in the present Act. The relevant portion of the old Act was s. 55 (1) (c) which referred to a dispute "between the society or its committee and any officer of the society". The word "officer" is defined in s. 2 as:

" 'officer' includes a chairman, secretary, treasurer, member of committee, or other person empowered under any rules made under this Ordinance or by-laws of a registered society to give directions in regard to the business of a registered society."

I agree with Lutta, J.A. that there is no evidence to show that the respondent was employed as an officer of the society within the meaning of this definition. The evidence establishes that the respondent was employed by the society as a farm manager. He was an employee of the society but not an "officer" of the society and therefore he was not affected by the provisions of s. 55 of the old Act.

The relevant portion of s. 80 (1) of the Act (Cap. 490) which Mr. Pall submits applies in this case states:

"If any dispute concerning the business of registered society arises –

(a)

(b) between members, past members, or deceased members, and the society, its committee or any officer of the society; or

(c)

it shall be referred to the Commissioner."

Admittedly the respondent was a member of the society but the present dispute is between the respondent as an employee of the society and the society. The dispute has nothing to do with his membership and his membership is not relevant to this dispute which is only in relation to his position as an employee, that is as a manager of the farm. Accordingly the provisions of s. 80 also do not apply here and the High Court was not deprived of jurisdiction to try this action.

I find the question of damages a matter of some difficulty. The appellant society elected to terminate the respondent's contract of service by a written notice. This letter gave him one month's salary in lieu of notice. The learned trial judge found that the respondent was entitled to reasonable notice and he found that reasonable notice in this case would be three months. I am of the view that the trial judge's findings on this question should be upheld. The respondent was only given one month's notice, this was insufficient, and he was therefore wrongfully dismissed and accordingly entitled to maintain this action. The question then arises whether the respondent has proved any damage. The appellant's advocate here stresses that part of his evidence where he states:

"Since August 1966, when I was asked to leave I am still doing my farming. I have not looked for another job, I did not want a job."

The trial judge made no specific findings on this question. Mr. Shah, for the respondent, submitted that this was a question of fact in issue before the judge

and the judge must have considered this matter when he decided to award Shs. 2,000/- damages. Generally speaking, an appeal court assumes that the trial judge knows the law and has, until the contrary is shown, correctly directed himself on issues before him. On this question it must be borne in mind that whilst the plaintiff must take reasonable steps to mitigate the damages the onus is on the defendant to prove that the plaintiff has failed to take such steps and further, this is a question of fact to be decided by the trial judge on the facts of each particular case. In this case there can be no doubt that the trial judge had this as a live issue before him. According to his notes this issue was raised by Mr. Malik, the appellant's advocate, in his final address.

When a court has to decide what is "reasonable notice" one of the factors to be taken into account is the nature of the employment and the availability of other posts of a suitable nature. The respondent's job here was of a somewhat unusual nature in that he was the manager of a co-operative society farm. The farm was apparently a big farm; it had some 5,000 head of cattle in 1965 and in 1964 made a net profit of over £11,000. It was owned by 90 members, each holding a share of Shs. 7,000/- and the respondent was one of the share-holders. No evidence was led to show the availability of any other job of a suitable nature or indeed of any other job at all. The respondent did say that he had not looked for another job nor did he want another job but it was not suggested to him that such a job was available or that he could have obtained one within the comparatively short period of three months fixed as the period of reasonable notice. Clearly jobs such as this must have been few and far between and I think that this must have been a circumstance which the judge took into account both in fixing the "reasonable notice" as being three months and in allowing the respondent Shs. 2,000/- damages, he must have concluded that it had not been proved that the respondent could have mitigated damages by getting another job within the period of three months. In arriving at the figure of Shs. 2,000/- he deducted one month's salary which he had been paid in lieu of notice from the three months' salary which he decided would represent the length of the reasonable notice. I cannot find that the trial judge misdirected himself on the law and his award was, in my view, both reasonable and equitable.

I agree with Lutta, J.A. on the other questions that arise in this appeal and I also agree with him that this appeal should be dismissed with costs and accordingly it is so ordered.

Law JA: I have had the advantage of reading in draft the judgment prepared by Lutta, J.A. which sufficiently sets out the facts. As regards the first ground of appeal, and the alternate ground, which are to the effect that the High Court had no jurisdiction to entertain the suit, whether under s. 55 (1) of the Co-operative Societies Act (Cap. 490), or under s. 80 (1) of the Co-operative Societies Act 1966 which latter Act repealed and replaced Cap. 490, I agree with Lutta, J.A., for the reasons given by him, that the respondent was not one of the persons referred to in either of those sections whose disputes with a society are excluded from the jurisdiction of the courts. This being so, it is unnecessary to decide, for the purposes of this appeal, whether the Co-operative Societies Act 1966, which came into force after the cause of action arose and the pleadings were filed, was intended to have retrospective effect.

The other grounds of appeal relate to the damages awarded to the respondent. The appellant society paid the respondent one month's salary in lieu of notice, but the respondent claimed to be entitled to six months' notice. The trial judge decided that three months was the proper period of notice for a person in the respondent's position, that is to say an estate manager earning Shs. 1,000/- a month together with the usual perquisites appertaining to such a post. I see no reason to differ with the judge on this point. The respondent was awarded

Shs. 2,000/- under this head, being presumably three months' salary less the one month's salary paid in lieu of notice. The appellant society however contends that it was the respondent's duty to mitigate damages, and as his evidence was that he did not seek employment after his dismissal, but preferred to work on his own farm, Mr. Pall submits that the respondent has not suffered any damage and is not entitled to any award under this head. The respondent's claim as pleaded was for general damages or in the alternative Shs. 6,000/- as compensation in lieu of notice. This is sufficient to distinguish this case from that of *P. R. Patel v. Lockyer and another* (1951), 24 K.L.R. Pt. 11, p. 24, in which the claim was limited to one month's wages in lieu of notice. Windham, J. (as he then was) held that such a claim for liquidated damages was only sustainable, in the absence of proof of damages, if a usage in Kenya could be established to the effect that a monthly paid employee is entitled to a month's notice, or to a month's salary in lieu. No usage having been pleaded or proved in the case now under consideration, the damages awarded can only have been in respect of a claim for general damages. In such a case, a plaintiff is entitled to recover for all damage flowing naturally from the wrongful dismissal. Usage not being relied on in this case, it was for the respondent to prove damage. The respondent not having sought alternative employment, and having been content to retire to his own farm, I do not see how he can be said to have suffered any damage, other than nominal, as a result of his wrongful dismissal. He has proved to the judge's satisfaction that he was entitled to three months' notice, and that he was given only one month's notice. It does not follow from this that he is entitled to two months' salary as damages, in the absence of usage to that effect. Two months' salary might well have been the proper measure of damages in this case, had the respondent deposed that, during that period, he had looked for but failed to find suitable employment, in which case the onus would have been on the appellant to show that alternative employment was available. But the respondent made no effort to minimize his loss by seeking suitable employment elsewhere, which it was his duty to do, see *Southern Highlands Tobacco Union Ltd. v. McQueen*, [1960] E.A. 490, a decision of this court which is to the point, but which for some reason was not referred to by counsel on either side. I would reduce the damages of Shs. 2,000/- awarded for the wrongful dismissal to the nominal figure of Shs. 100/-.

As regards the appeal against the award of leave pay, I would not interfere with the award under this head. The trial judge found that the respondent had a contractual right to leave which he was prevented from taking by reason of the wrongful dismissal, and I see no reason to come to a different conclusion. In the result I consider this appeal to have been partly successful, and I would amend the judgment and decree by substituting the figure of Shs. 100/- for the figure of Shs. 2,000/- as damages for wrongful dismissal.

Appeal dismissed

For the appellant:

G. S. Pall

For the respondent:

A. B. Shah (instructed by *Shah & Parekh*, Nairobi)

Dhanji Ramji v Malde Timber Co
[1970] 1 EA 422 (CAN)

Division: Court of Appeal at Nairobi
Date of judgment: 7 May 1970
Case Number: 47/1969 (88/70)
Before: Spry VP, Law and Lutta JJA
Sourced by: LawAfrica
Appeal From: The High Court of Kenya – Chanan Singh, J.

[1] Appeal – Record – Whether record must include affidavit filed in support of interlocutory application but not tendered as exhibit – Court of Appeal for East Africa Rules 1954, r. 62 (4).

[2] Civil Practice and Procedure – Pleading – Amendment – Whether original pleading may be referred to.

[3] Evidence – Document – Letter – Proved by addressee and signature of sender identified – Whether admissible.

[4] Evidence – Affidavit – Filed in support of interlocutory application – Not tendered as exhibit – Not evidence in suit.

[5] Evidence – Pleading – Amendment – Whether original pleading may be referred to.

Editor's Summary

The respondent obtained judgment in the High Court against the appellant whom it alleged to be a partner in Uganda firm to which it had supplied goods in May 1967. In October 1967 a defence was filed on behalf of the appellant describing him as partner in the firm and making several allegations including allegations that payment for the goods was subject to 90 days' credit which had not expired and that a promissory note had been accepted for the full amount claimed.

In November 1967 a notice was filed under the Registration of Business Names Act in Uganda alleging that the appellant had retired from the partnership in January 1967. In December 1967 the other partner in the firm filed his petition in bankruptcy. In February 1968 the appellant was given leave to amend his defence to allege that he was not a partner in the firm in May 1967.

In support of his case below the respondent tendered a letter written by a Uganda advocate to a third party referring to a meeting of the partners of Lalji Ratna & Co. The writer of the letter was not called, but it was produced by the addressee and the writer's signature was identified. The respondent also sought to rely on an affidavit filed by the appellant in support of his application for leave to defend. The appellant was cross-examined on the affidavit in the High Court, but it was not put in evidence as an exhibit.

On the facts, including the original defence, the judge found that the appellant was a partner in the firm in May 1967. The appellant appealed, contending that the judgment was not based on legitimate inferences, but on guesses, conjecture and speculation, and that the original defence could not be looked to.

Held –

- (i) (by Law, J.A. and Lutta, J.A., Spry, V.-P. dissenting) the letter had been sufficiently proved and should have been admitted; but the judge would not necessarily have come to a different conclusion had it been admitted;

(by Spry, V.-P.) being to a third party, the letter was not an admission, and it was not admissible as evidence of the facts it contained under s. 35, Evidence Act;

- (ii) (by the court) the affidavit could not be looked at as it had not been put

in evidence in the court below. Rule 62 (4) Court of Appeal Rules 1954 refers only to affidavits in evidence in the court below (*Hassanali Issa & Co. v. Jeraj Produce Store* (8) followed);

- (iii) while the amended pleading is conclusive as to the issues for determination, the original pleading may be looked at if it contains matter relevant to the issues (dictum of Newbold, J.A. in *Eastern Radio Service v. R. J. Patel trading as Tiny Tots* (7) applied);
- (iv) the judge's inference was founded on positive facts and was almost irresistible.

Appeal dismissed.

Cases referred to in judgment:

- (1) *Wright v. Doe* (1837), 112 E.R. 488.
- (2) *Hawkins v. Powell*, [1911] 1 K.B. 988.
- (3) *Kerr v. Ayr*, [1915] A.C. 217.
- (4) *Jones v. Great Western Rys.* (1931), 144 L.T. 194.
- (5) *Caswell v. Powell*, [1940] A.C. 152.
- (6) *Benmax v. Austin Motor Co. Ltd.*, [1955] A.C. 370.
- (7) *Eastern Radio Service v. R. J. Patel (trading as Tiny Tots)*, [1962] E.A. 818.
- (8) *Hassanali Issa & Co. v. Jeraj Produce Store*, [1967] E.A. 555.

The following considered judgments were read:

Judgment

Law JA: This appeal arises out of a civil suit in which the respondent, the Malde Timber Company was awarded judgment against the appellant for the sum of Shs. 8,339/60 allegedly due to the respondent by a firm registered and trading in Uganda under the name of Mistry Lalji Ratna and Co., the trial judge having found that at all material times the appellant was a partner in the said Uganda firm. It is against this finding that the appellant appeals on three main grounds: firstly, that there was no evidence to support the finding that the appellant was a partner on the material date, 12 May 1967; secondly, that the available evidence was all to the effect that the appellant had ceased to be a partner with effect from 1 January 1967; and thirdly that the judge's finding that the appellant was a partner on 12 May 1967, was based on suspicion, speculation and private opinion and belief, without any evidence in support.

The facts and history of events leading up to this appeal are as follows. The firm of Mistry Lalji Ratna and Co. (hereinafter referred to as the Uganda firm) came into existence and was duly registered under the Registration of Business Names Act of Uganda on 19 May 1966, the partners being described as Lalji Ratna (hereinafter referred to as the first defendant) and Dhanji Ramji (hereinafter referred to as the appellant). On 12 May 1967, a plaint was filed by the respondent against the first defendant and the appellant, who were described as "both trading under the name or style of Patel Lalji Ratna and Co." the word "Patel" being amended subsequently to "Mistry", claiming Shs. 8,339/60 the value of goods sold and delivered in 1967. On 3 October 1967, an appearance was entered by Messrs. Khanna & Co. on behalf of the appellant who was described in the memorandum of appearance as "Patel Dhanji Ramji a

partner in the firm of Patel Lalji Ratna & Co.” On the same day Messrs. Khanna filed a defence (which I shall refer to hereinafter as the original defence) on behalf of the appellant. In the original defence, the appellant was described as “a partner in Patel Lalji Ratna & Co. (a firm)”. The original defence began with

the words “this defendant by way of the defence of the firm states:” and seven paragraphs followed, raising on behalf of the firm a number of defences, including a denial that goods were sold to the firm, an allegation that payment for the goods, if supplied, was subject to 90 days’ credit which had not expired, and an allegation that a promissory note for the full amount claimed, payable 90 days after date, had been accepted from the firm in satisfaction of its claim by the respondent. On 17 November 1967, a “Note of change in Particular Registered” was filed in Kampala by the first defendant and the appellant under the Registration of Business Names Act, containing the following:

“Dhanji Ramji retired from the partnership as from 1 January 1967, and Lalji Ratna took over the assets and liability of the firm from that date.”

On 7 December 1967, the first defendant filed his petition in bankruptcy and on the 15th of that month a receiving order was made. Among his papers was found a document dated 7th January 1967, purporting to be an agreement providing for the retirement of the appellant as a partner from the Uganda firm with effect from 1 January 1967. On 2 December 1967, judgment was signed against the first defendant, and the appellant was given leave to defend on the strength of an affidavit in which he swore that he was not a partner in the Uganda firm at the material time. On 29 February 1968, Madan, J. allowed an application for the amendment of the defence in the following terms:

“I think I shall allow this application so that the real questions in controversy between the parties may be determined.”

The amended defence, which I shall refer to as the new defence, was thereupon filed. Its effect is to allege that the appellant ceased to be a partner in the Uganda firm with effect from 31 December 1966, and that he was therefore not liable for debts of the Uganda firm incurred after that date. On 8 March 1968, the respondent in a “Reply to the Amended Defence”, joined issue with the new defence, alleged that the appellant was at all material times a partner in the Uganda firm, and alleged that by reasons of representations made “even as late as September 1967”, the appellant was estopped from denying that he was a partner.

In this state the trial of the suit opened on 13 May 1968. The hearing occupied eight full days scattered over a period of 14 months, much of the time being taken up with objections necessitating at least twelve considered rulings. In the end the only substantial issue for consideration, and the only one which concerns this appeal, was whether the appellant was a partner in the Uganda firm at the material times. I cannot help feeling sympathy for the parties to this appeal, who will have to foot the bill for this protracted intellectual exercise, which in its length and no doubt expense bears no relation to the dispute on which the parties wanted a decision.

The respondent’s case was based on an admission of partnership allegedly made by the appellant at a meeting held on 1 September 1967, between the parties in Kampala, and on the fact that the Register of Business Names in Kampala was not altered to show the appellant’s purported retirement from the firm until more than 6 months after the goods the subject of the suit had been delivered. As regards the admission the judge gave the matter very careful consideration, and came to the conclusion that on this issue he preferred the appellant’s evidence that he was not present at the meeting of 1 September, for the following reasons:

- (a) certain discrepancies between the evidence of the respondent’s representative Mr. Zaverchand Shah and that of two witnesses called on behalf of the respondent who deposed that the appellant was present at the meeting; and

- (b) because the promissory notes given at that meeting were signed by the first defendant and not by the appellant, who in the judge's view was the more substantial partner.

It will be convenient at this stage to deal with a cross-appeal filed on behalf of the respondent, which is to the effect that the judge erred in finding contrary to the evidence that the appellant was not present at the meeting. In support of the cross-appeal, Mr. Gautama relies inter alia on two documents. The first is a letter purporting to have been written on 5 September 1967, by an advocate in Kampala to a third party in Nairobi, on behalf of the Uganda firm, in which a reference was made to a meeting held on 1 September, which was attended by "the partners" of Lalji Ratna & Co. The judge refused to admit this letter in evidence as the writer was not called to prove it. In my view the letter was sufficiently proved; the addressee produced it and proved receipt and the Assistant Administrator General of Uganda, who was a witness in the suit, proved the writer's signature, with which he was familiar. Mr. Gautama attaches great importance to this letter, which in his submission indicates that the evidence of Mr. Zaverchand Shah and his witnesses to the effect that there was a meeting in Kampala attended by both partners in the Uganda firm was true. Although I agree with Mr. Gautama that this letter was wrongly excluded from evidence, I am not satisfied that if it had been admitted the judge would necessarily have come to a different conclusion on the issue now under consideration. In the absence of the evidence of the writer, I do not think that the use of the word "partners" in the letter has any great probative value. It might be a slip of the pen, or capable of some other explanation known only to the writer. The other document on which Mr. Gautama seeks to rely is the appellant's affidavit filed in the course of his application for leave to defend, in which he referred to the making of promissory notes. Mr. Gautama's argument is that if the appellant was not present at the meeting, he would not have known that promissory notes had been given. The appellant was cross-examined on this affidavit, and although he denied mentioning promissory notes, the affidavit was not put in evidence as an exhibit to discredit him. Mr. Gautama submits that we are entitled to look at the affidavit, which forms part of the supplementary record filed by the respondent. He relies on r. 62 (4) of the rules of this court, which provides that the record of appeal shall consist of:

- "(c) copies of all affidavits read . . . in the court below so far as they are material; and
- (g) such other documents . . . as may be necessary for the proper determination of the appeal, including any interlocutory proceedings. . . ."

At first, I was in agreement with Mr. Gautama's submission on this point, but on further consideration I am of opinion that the references to affidavits and documents in the paragraphs quoted above must be construed as references to affidavits and documents which were in evidence in the court below. I find support for this view from the following extract from the judgment of Sir Charles Newbold, P. in *Hassanali Issa and Co. v. Jeraj Produce Store*, [1967] E.A. 555, at p. 559, in which he refers to affidavits filed in an application for leave to defend, and says:

"Having obtained leave to defend, then the affidavit upon which that leave was granted remains, of course, upon the record but it is in no circumstances evidence in the case itself."

As Mr. Gautama did not make the appellant's affidavit evidence, by putting it in as an exhibit at the trial in the court below, it follows that in my view we cannot look at it. For these reasons I consider that the cross-appeal fails.

The judge, not being satisfied on the evidence itself that the appellant had

represented himself to be a partner at the material times, has nevertheless found that he was such a partner, for the following reasons. The plaint was filed on 20 September 1967, and served on the appellant on 23 September. He left for India together with the first defendant on 24 September, and according to his evidence he did not see Mr. D. N. Khanna his advocate before leaving, but either sent him the summons by his clerk or by post from India. The record does not state how Mr. Khanna received the instructions on which he framed the memorandum of appearance and the old defence; presumably they came to him in the same way as the summons, through the appellant's clerk or from the appellant in India. Both in the appearance and the old defence, the appellant is described as a partner in the Uganda firm. The old defence was stated to be "by way of defence of the firm". The notice of change in the Uganda firm's constitution was not registered until after the appellant's return from India on 14 November 1967. The judge commented that however hurried the instructions, if the appellant had in fact ceased to be a partner on 1 January 1967, this is one fact which would have been communicated to his advocate as it represented a complete answer to the claim. The judge also commented on the defence pleaded in the old defence, that 90 days credit had been given and had not expired, so that the suit was premature, and he asked himself how Mr. Khanna could have known of this on 3 October 1967, when the old defence was filed, if he had not been so instructed. From all these matters, the judge has drawn the inference that the appellant was a partner of the Uganda firm at the material times, and that the dissolution agreement dated 7 January 1967 was not a genuine document, but:

"... was probably prepared and signed at or about the same time as the Notice of Change. It was certainly written after 12 May 1967 the date of sale of goods."

Mr. Khanna has strongly attacked these findings as not being legitimate inferences drawn from positive facts, but as being guesses, conjecture and speculation, and has drawn our attention to the well-known cases of *Hawkins v. Powell*, [1911] 1 K.B. 988; *Kerr v. Ayr*, [1915] A.C. 217; *Jones v. Great Western Railway*, (1931) 144 L.T. 194; and *Casswell v. Powell*, [1940] A.C. 152, in which are discussed the distinction between inferences and deductions properly drawn from facts, and mere conjecture which does not rest on premises of fact. Mr. Khanna objected strongly to the judge referring to the old defence for material on which to base inferences; he submitted that once a pleading has been replaced by an amended pleading, the old pleading ceases to have any relevance and cannot even be looked at. The new pleading is of course conclusive as to the issues for determination, but it does not in my view replace the old pleading for all purposes. In *Eastern Radio Service v. R. J. Patel (trading as Tiny Tots)*, [1962] E.A. 818 the submission had been made that an amendment of the plaint made it necessary to treat the previous pleading as if it had never existed. Newbold, J.A. (as he then was) had this to say on this point, at p. 834 –

"Logic and common sense requires that an amendment should not automatically be treated as if it, and nothing else, had ever existed."

The test is, in my opinion, whether the old pleading contains matter relevant to the questions for determination in the suit; if so, it may be looked at. The old defence in this case contained references to highly relevant matters such as:

- (a) that the appellant was therein described as a partner,
- (b) that he was purporting to file the defence on behalf of the firm, and
- (c) that he was raising defences such as length of credit, and non-maturity of promissory notes, which one would expect an individual who was a partner to have knowledge, and which, as the judge commented,

could hardly have been “invented” by the advocate without instructions.

Such statements of facts are not of course conclusive nor do they amount to binding admissions and they may be capable of explanation. The only explanation that the appellant could give was that his instructions were hurriedly given. The judge could not accept this, neither can I. Once it is accepted that there was time and opportunity to give some instructions, it seems to me quite unbelievable that the one piece of information which was vital and conclusive as a defence should not have been given, whether by the appellant himself or his clerk on his behalf, and that is that the appellant was not a partner of the Uganda firm at all in 1967. It follows in my view, that notwithstanding the presumptions of innocence, and of genuineness of documents, the judge was entitled to find that the agreement of dissolution was not signed, as it purported to be, on 7 January 1967, but on a date after that of the sale of the goods in May 1967. Far from being speculative guesswork, I consider the judge’s inference in this case to have been founded on positive facts, and to have been so strong as to be almost irresistible. I have certainly not been persuaded that we ought to interfere with his findings. I would dismiss this appeal, and the cross-appeal, in each case with costs including a certificate for two counsel.

Spry VP: Save in one minor respect, I agree with the judgment of Law, J.A. and would only comment briefly on three aspects of this appeal.

First, as regards amended pleadings. It is clear that the court looks only to the pleading as amended in deciding the issues. Again, where an original pleading contained an admission which was deleted in the amended pleading, that admission can no longer be relied on. But that does not mean that the original pleading has entirely ceased to exist. It remains on the record and it is a rule of practice that the amendment must be so effected that what was originally written remains legible. It seems to me, although I can find no authority on the subject, that it is proper to refer to an original pleading for certain limited purposes, one of which is, I think, to show inconsistency. In many cases, of course, the reason for an amendment is almost self-evident, as where it results from pleading in reply or from replies to interrogatories or discovery. In other cases the need for amendment may spring from a genuine mistake, as Mr. Khanna claims was the case here. In still other cases, the inconsistency may be such that no particular significance can be attached to it. In the present case, the change effected by the amendment was a startling one: the appellant began by saying that he was a partner in the firm of Mistry Lalji Ratna & Co. but that the firm was not liable to the respondents partly for technical reasons, partly because no goods had been sold and delivered to the firm, or if they had, the agreed period of credit had not expired, and because promissory notes had been given by way of payment but had not fallen due; the amended defence was that the appellant was not a member of the firm at any material time. I think the trial judge was entitled to consider whether the inconsistency had been satisfactorily explained and to take it into account in deciding whether or not he believed the appellant’s evidence.

Secondly, I agree that Mr. Gautama, in arguing the appeal, was not entitled to refer to the affidavit which had been filed to support the application for leave to defend. This was not evidence at the trial. Indeed, it could not have been, being partly hearsay. It was referred to in the cross-examination of the appellant, and it could have been put in as evidence at the trial for the limited purpose of proving inconsistency, but this was not done.

Thirdly, and here, with respect, I differ from Law, J.A., I do not think that the letter written by the advocates for Mistry Lalji Ratna & Co. to a third party

was admissible in evidence. Being written to a third party, it could not be relied on as an admission, because it could only have amounted to an admission had it been addressed to the respondents or someone through whom they claimed (*Wright v. Doe* (1851), 112 E.R. 488 at p. 515). I do not think it was admissible evidence of the facts it contained, because the conditions of s. 35 of the Evidence Act were not satisfied. However, the question is not of importance because in any case the evidential value of the letter was negligible. It merely contained a reference to “the partners” in the firm of Mistry Lalji Ratna & Co.: it contained no indication who the partners were or what knowledge the writer had of the partnership affairs or how or from whom he received his instructions.

There will be an order in the terms proposed by Law, J.A.

Lutta JA: I have had the advantage of reading in draft the judgment of Law, J.A., and I respectfully agree with him that the appeal and cross-appeal should be dismissed. There is little that I wish to add.

This appeal is chiefly on questions of fact and inference. It is well recognised that a court of appeal will be hesitant to interfere where a decision has been based on facts alone. In *Benmax v. Austin Motor Co. Ltd.*, [1955] A.C. 370, the headnote, which I think is relevant to the instant case, reads as follows:

“There is a distinction between the finding of a specific fact and a finding of fact which is really an inference drawn from facts specifically found. In the case of the latter the appellate tribunal will more readily form an independent opinion than in the case of the former which involves the evaluation of the evidence of witnesses, particularly where the finding could be founded on their credibility or bearing.”

Firstly, I would say that, I cannot agree with Mr. Khanna that the judge assessed the credibility of witnesses more from faulty evaluation of the evidence and inferences therefrom than from their bearing. Of the admission contained in the first defence and explanation given in respect thereof, the judge says, “However hurried the instructions, is it likely that an experienced businessman would forget to tell his advocate that he was not liable at all because he had retired from the firm five months before the date of sale? Secondly, the defence pleaded that the period of credit agreed had not expired and that therefore the suit was premature. It is difficult to believe that this defence was invented by the lawyer.” Thirdly, I would say that in respect of the facts as he found them he has drawn correct inferences of fact, and in such material respects as not to alter the balance of probabilities.

Appeal dismissed.

For the appellant:

D. N. Khanna and P. E. Nowrojee (instructed by *Khanna & Co.*, Nairobi)

For the respondent:

S. C. Gautama and A. B. Shah (instructed by *Shah & Parekh*, Nairobi)

Adonia v Mutekanga
[1970] 1 EA 429 (CAK)

Division: Court of Appeal at Kampala

Date of judgment: 10 January 1970

Case Number: 30/1969 (24/70)
Before: Sir Charles Newbold P, Duffus VP and Spry JA
Sourced by: LawAfrica
Appeal from: The High Court of Uganda – Sheridan, Ag. C.J.

[1] Civil Practice and Procedure – Setting aside – Ex parte judgment – Wide powers of court to set aside.

[2] Civil Practice and Procedure – Inherent jurisdiction – Exclusion by Alternative procedure – Availability of Alternative specific procedure does not limit court’s jurisdiction unless statute provides.

[3] Civil Practice and Procedure – Review – Ex parte judgment – Person not served a party aggrieved who can apply for review – O. 42 r. 1 Civil Procedure Rules (U.).

[4] Land – Practice – Vesting order – Failure to serve registered proprietor avoids vesting order.

[5] Land – Trust of – Power of court to enforce fiduciary relationships under s. 174, Registration of Titles Act by means of vesting orders not limited by s. 184 – Registration of Titles Act (Cap. 205), ss. 174, 184 (U.).

Editor’s Summary

This appeal is the product of long litigation concerned with the inheritance of certain land, the important events for purpose of this appeal were a final order of the High Court on appeal from the Bugembe District Court of 1954 confirming the appellant as entitled to the land in question. In 1965 the appellant secured a vesting order under the Registration of Titles Act in ex parte proceedings in the High Court. Subsequently, he sold part of the land to a third party, which sale was duly registered. In 1966 the respondent lodged a caveat and subsequently filed notice of motion to set aside the vesting order of 1965. In 1968 the appellant’s application to set aside was allowed and this appeal was brought against that order. The appellant claimed that in making the order the High Court improperly relied upon its inherent jurisdiction and that the specific alternative procedure of review should have been applied for by the respondent. He further argued that the vesting order was a mere formality to permit registration giving effect to a final order of 1954, and, as such, could properly be made ex parte. The respondent maintained that all interested parties must be before the court for such proceedings and that the vesting order was incompetent since it did not fall within s. 184 of the Registration of Titles Act.

Held –

- (i) application for review could properly have been made under O. 42 r. 1 of the Civil Procedure Rules;
- (ii) the existence of a specific procedure provided by rule does not restrict the court’s inherent jurisdiction unless a statute so provides;
- (iii) the exercise of inherent jurisdiction is a matter of judicial discretion which was properly exercised in this case;
- (iv) section 184 of the Registration of Titles Act does not limit the court’s power to enforce fiduciary relationships under s. 174;

(v) proceedings for vesting orders must be served on the registered proprietor, if living;

- (vi) the granting of the vesting order ex parte was an error which avoided the order;
- (vii) the 1968 order setting aside the vesting order was correct in so far as it affected the land still registered in the appellant's name;
- (viii) in so far as the order purported to divest the registered proprietor of lands already sold by the appellant without making that proprietor a party, the 1968 order was void;
- (ix) the order of 1954 was a final order;
- (x) in so far as the 1968 order purported to nullify the 1954 order, it was void.

Appeal allowed in part.

Cases referred to in judgment:

- (1) *Ahmed H. Mulji v. Shirinbai Jadavji*, [1963] E.A. 217.
- (2) *Jooma v. Bhambra*, [1967] E.A. 326.
- (3) *Rawal v. Mombasa Hardware Ltd.*, [1968] E.A. 392.

The following considered judgments were read:

Judgment

Spry JA: This is an appeal from an order of the High Court, vacating a vesting order previously made by that court, relating to a piece of land comprising 2 acres, registered in Mailo Register, Volume 757, folio 13.

Although the main issues in the appeal are comparatively simple, it is, I think, desirable to set out the history of the matter. Daudi Mutekanga died in or before the year 1947, leaving a substantial estate. The Busoga Central Native Court appointed arbitrators to select an heir and appoint guardians and the arbitrators selected an heir and administrator. It appears from the record that this was the appellant, Adonia Justin Mugezitalemwa, although Mr. Kazzora in his address said it was the respondent, Azaliya W. Nviiri Mutekanga; however, the question is not now material. The appointment was confirmed by the District Commissioners. One Yonasani Kabali Musuro, who was the head of the clan, appealed to the High Court against the decision, by way of an application for revision, and it was set aside by an order made in Civil Revision No. 42/47. The High Court ordered that there be a meeting of the whole clan to determine the matter. A meeting was held on 5 April 1948, when the respondent, Azaliya Nviiri Mutekanga, was selected as heir and guardian. On 17 April 1950, the respondent, Mutekanga, obtained registration as proprietor of the land with which we are concerned. We were informed from the Bar that this was on the authority of a certificate of succession issued by the District Commissioner, Busoga, but this does not appear on the record.

There matters rested until 1951, when the appellant, Adonia, filed a suit in the gombolola court against Yonasani, alleging that the latter had not carried out the terms of the deceased's will. Yonasani was successful in the gombolola court, but the decision was reversed in the saza court and this decision was confirmed by the District Commissioner. Yonasani then appealed to the High Court by way of an application for revision and by his order dated 25 June 1952, in Civil Revision 31 of 1952, Ainley, J. (as

he then was) remitted the matter to the Bugembe District Court, with certain specific directions. At this stage, the issues were whether a certain document was to be regarded as a valid will and whether, if so, it was to be carried out literally or varied so as to avoid perpetual trusts which the will appeared to create, while giving substantial effect to the deceased's wishes. The district court, while accepting the will as valid,

decided that it could not be carried out literally. Accordingly a scheme of distribution was made; the respondent, Mutekanga was confirmed as heir; guardians were appointed for certain children and one Musa Kaduyu was appointed head of the clan in place of Yonasani. Under the scheme of distribution, the appellant, Adonia, was to receive the land the subject of these proceedings. Yonasani once more appealed to the High Court by way of application for revision, apparently only against his supersession as clan head, but by his order of 31 May 1954, Lewis, J. confirmed in its entirety the decision of the district court.

In 1965, the appellant, Adonia, applied to the High Court for a vesting order under the Registration of Titles Act, having been informed that this was essential to obtaining registration in the Mailo Register. The application was heard *ex parte* in Miscellaneous Cause 16 of 1965 and on 5 May 1965, an order was made as prayed. This order was expressly made under s. 174 of the Act, that is to say, it treated the registered proprietor, the respondent Mutekanga, as having held the land as a trustee for the appellant, Adonia. It was registered on 20 May 1965. Later, the appellant, Adonia, sub-divided the land and on 8 March 1966, sold .11 acre, then known as Kibuga Block 15, plot 29, to one George William Bakibinga and this sale was duly perfected by registration.

On 6 April 1966, the respondent, Mutekanga, lodged a caveat claiming ownership of the residue of the land formerly registered in Mailo Register, Volume 757, folio 13, and then known as Kibuga Block 15, plot 30, and on 12 April 1966, he filed a notice of motion to set aside the vesting order of 5 May 1965. After various further steps which do not concern this appeal, the application to set aside the vesting order was allowed by the Acting Chief Justice by order dated 20 December 1968, in Miscellaneous Cause 16 of 1965. It is against that order that the present appeal is brought.

In his order of 20 December 1968, the Acting Chief Justice, after setting out the circumstances in which the vesting order of 5 May 1965, had been made, observed that it had been made *ex parte* and *per incuriam*. He summarized the provisions of s. 184 of the Registration of Titles Act, and added that under s. 185 a certificate of title can only be cancelled as a result of proceedings against the registered proprietor. He remarked that here the proceedings had been against the clan head, not against the respondent, Mutekanga.

It should be noted that the application to set aside the vesting order was made in respect of both plots 29 and 30 of Kibuga Block 15, that is in respect of the whole of the land formerly registered in Mailo Register, Volume 757, folio 13. In his order, the Acting Chief Justice referred to the registration of the land in the name of the appellant, Adonia; to the sub-division of the land, and the subsequent sale of plot No. 29. The order then concludes:

“It seems that these transactions will be nullified if, in the inherent jurisdiction of the court, as I must do, I set aside the vesting order. The confirming order of Lewis, J., as far as this land is concerned, must also be ineffective.”

The first ground of appeal is expressed as a submission that the Acting Chief Justice, having made the vesting order of 5 May 1965, was *functus officio* and had no power to set it aside by his order of 20 December 1968. In fact, however, Mr. Kazzora, who appeared for the appellant, Adonia, argued on a rather different footing. The judge had, as I have said, expressly made his order of 20 December 1968 in exercise of the inherent powers of the court. Mr. Kazzora submitted, relying on *Ahmed H. Mulji v. Shirinbai Jadavji*, [1963] E.A. 217 and *Jooma v. Bhambra*, [1967] E.A. 326, that inherent jurisdiction was not available as the respondent, Mutekanga, had a specific procedure available to him under

the Civil Procedure Rules but had not availed himself of it. That procedure was provided by O. 42, r. 1, which permits applications for review.

On this question, Mr. Kiwanuka observed that the notice of motion did not state what power was sought to be invoked, but he submitted that it was really immaterial whether the Acting Chief Justice exercised his inherent powers or the powers conferred by O. 42, r. 1, and he suggested that the inherent powers had been preferred as it was doubtful if O. 42, r. 1 was appropriate.

In my view, O. 42, r. 1 could properly have been invoked, because the right to apply is not restricted to parties but is available to any person “considering himself aggrieved”; there was, I think, a “mistake or error apparent on the face of the record” in the fact that the application was heard *ex parte* and the vesting order, though not expressed to be made “against” anyone, undoubtedly operated against the respondent, Mutekanga. On the other hand, there is no rule of law, as Mr. Kazzora implied, that inherent powers cannot be invoked where another remedy is available. The position, as I understand it, is that the courts will not normally exercise their inherent powers where a specific remedy is available and will rarely if ever do so where a specific remedy existed but, for some reason, such as limitation, is no longer available. The matter is, however, not one of jurisdiction. The High Court is a court of unlimited jurisdiction, except so far as it is limited by statute, and the fact that a specific procedure is provided by rule cannot operate to restrict the court’s jurisdiction, *Rawal v. Mombasa Hardware Ltd.*, [1968] E.A. 392. In the present case, I think the Acting Chief Justice, in choosing to exercise his inherent powers was exercising a judicial discretion and I see no reason to interfere with the exercise of that discretion. I have no doubt that he had jurisdiction and that he was not *functus officio*. It is not, I think, irrelevant to add that under s. 197 of the Registration of Titles Act the same rules of procedure and practice are to be observed in proceedings under the Act as are in force for the time being in respect of ordinary proceedings; that under s. 93 of the Civil Procedure Act (Cap. 65) the procedure with regard to suits is to be followed so far as it is applicable in other proceedings in courts of civil jurisdiction; and that the courts have wide powers to recall decrees passed *ex parte* in suits.

The other grounds of appeal all go to the merits of the order of 20 December 1968. I confess that I found some difficulty in following some of the arguments advanced on both sides, but I hope that I have not misunderstood them. Mr. Kazzora’s argument, as I understood it, is that the rights of the parties had finally been determined by the order of 31 May 1954 in Civil Revision 31 of 1952, an order from which no appeal lay. Therefore the vesting of 5 May 1965, was really nothing more than a formality to enable registration and could properly be made *ex parte*, and even if it had been wrong to make it *ex parte*, there was no reason to set it aside, since it merely gave effect to an order which was final and conclusive.

This argument depends entirely on a submission that Yonasani, as head of the clan, was all along representing the interests of the respondent, Mutekanga. He was, in effect, a trustee and as such a decision against him was binding on the beneficiary.

Mr. Kiwanuka argued, first, that applications under the Registration of Titles Act are, in practice, heard as miscellaneous causes and as such should be initiated by notice of motion, with all interested parties brought before the court. Secondly, he argued, relying on the reasoning of the order of 20 December 1968, that in any case, the application for a vesting order could not have been competent, because the matter did not fall within the provisions of s. 184 of the Registration of Titles Act.

As regards the first of Mr. Kiwanuka’s submissions, I express no opinion as

to the form in which applications for vesting orders should be brought because this question was not fully argued before us, but I have no doubt whatever that the proceedings must be inter partes and that in every case the registered proprietor, if living, must be a party.

As regards the second, I must, with respect, disagree. The Registration of Titles Act is not a very satisfactory statute and some of its provisions appear to be in conflict with others. The Act must therefore be read as a whole if the intention of the legislature is to be ascertained. It is quite true, as Mr. Kiwanuka says, that s. 56 provides that a certificate of title “shall be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in . . . the land therein described is seized or possessed of such estate or interest . . .”, while s. 184 provides that “No action of ejectment or other action for the recovery of any land shall lie or be sustained against the person registered as proprietor . . .”, except in certain specific cases none of which is here relevant. Section 174, however, enables the making of a vesting order, “Whenever any person interested in land under the operation of this Act or any estate or interest therein appears to the High Court to be a trustee of such land, estate or interest within the intent and meaning of any law for the time being in force relating to trust and trustees . . .”. In my view, the latter section cannot possibly be governed by s. 184, as this would virtually deprive it of all meaning. Although the conception of the sanctity of the register runs through the Act, it is clear that the legislature intended to reserve to the High Court the power to enforce fiduciary obligations and it was expressly under this power that the Acting Chief Justice made his order of 5 May 1965.

As regards Mr. Kazzora’s submissions, I cannot accept that a vesting order could properly be made ex parte, or that its making ex parte was a mere irregularity. It seems to me that without service on the registered proprietor, there could have been no jurisdiction to make a vesting order. The order that was made is, therefore, in my opinion a nullity.

If the vesting order had been made in a suit, or on an application, as may be appropriate, with the respondent, Mutekanga, as defendant, or respondent, no difficulty would have presented itself. The order would have been made under s. 174 and would not have offended against s. 185. The doctrine of estoppel by record would probably have been invoked, and might have succeeded, although it is unfortunate that the respondent, Mutekanga, was not made a party to the proceedings which culminated in the order of 31 May 1954, as had been directed in the order of 25 June 1952. It would appear, however, from the record that Yonasani was acting in a fiduciary rather than an administrative capacity – there is nothing to suggest that he had any beneficial interest – and if he was acting as a trustee the decision against him would probably have been binding on the beneficiary. I express no firm opinion on this, as the issue of fact would have had to be decided on evidence and the question of law has not been fully argued.

I now turn back to the order of 20 December 1968. I think, with respect, that it was clearly right and must be upheld as regards plot 30, because the then registered proprietor, the respondent Mutekanga, had not been a party to the proceedings which culminated in the vesting order, not because of any conflict with s. 184 or 185 of the Registration of Titles Act. I think it was clearly wrong and must be set aside so far as it purported to relate to plot 29 and to divest the registered proprietor, Bakibinga, of his estate, without his being a party to the proceedings. I think it was wrong and must be set aside so far as it purported to nullify the order of 31 May 1954: I think that was a final order. I realize that this leaves the matter in a most unsatisfactory state but I cannot see any alternative open to us.

I would accordingly allow this appeal to this extent: first, that I would set

aside the order appealed from so far as it purports to relate to Kibuga Block 15, plot 29, and, secondly, I would set aside the order appealed from so far as it purports to nullify the order of 31 May 1954. I would dismiss the appeal so far as it relates to Kibuga Block 15, plot 30.

There was no order for costs in the High Court. As regards the appeal, the respondent, Mutekanga, has been largely but not entirely successful and I would allow him one-half of his taxed costs of the appeal.

I must add a brief criticism of the record of appeal. The memorandum of appeal is argumentative, contrary to r. 62 (1) of the Eastern African Court of Appeal Rules, 1954; the documents in the record appear to be in quite hap-hazard order; there are documents that appear unnecessary and there is at least one document missing that ought to be there. In every case relating to registered land, and especially where rectification of the register is sought, there should be a certified extract showing all relevant entries in the register: I do not know whether such an extract was produced in the High Court, as it should have been: certainly it does not appear in the record of appeal.

Sir Charles Newbold P: I have had the advantage of reading in draft the judgment of Spry, J.A. and for the reasons he gives I agree with him that the position is as follows:

- (1) The order of 20 December 1968 (the order under appeal) is valid in so far as it sets aside the order of 5 May 1965 (the vesting order) in its application to plot 30. In the result A. W. N. Mutekanga will be restored as the registered owner of that plot.
- (2) The order under appeal is invalid in so far as it would have the effect of setting aside the registration of the present registered owner of plot 29, Mr. G. W. Babikanga. In the result Mr. Babikanga remains the registered owner even though his title on the register stems from a person who did not himself have title.
- (3) The order under appeal is invalid in so far as it sets aside the confirming order of 31 May 1954 and the subsequent sale of plot 29.

I desire to endorse the criticisms of Spry, J.A. as to the defects of the record of appeal. I have noticed that recently records have been very carelessly prepared and presented. At this last sessions we deprived a successful appellant of his costs for preparing the record and we shall take similar action in similar cases in the future.

There will be an order in the terms proposed by Spry, J.A.

Duffus VP: I agree with the judgment of Spry, J.A.

Appeal allowed in part.

For the appellant:

J. W. R. Kazzora (instructed by *Kazzora & Co.*, Kampala)

For the respondent:

B. K. M. Kiwanuka (instructed by *Kiwanuka & Co.*, Kampala)

Division: High Court of Kenya at Nairobi
Date of judgment: 21 November, 1969
Case Number: 116/1969 (36/70)
Before: Mwendwa CJ and Madan J
Sourced by: LawAfrica

[1] Contract – Frustration – No frustration if parties have provided for contingency.

[2] Master and servant – Trade Dispute – Industrial Court Award – Inconsistency with written law – No inconsistency when award deals with consequences of frustration of contract provided for by parties – Law Reform (Frustrated Contracts) Act 1943; Law of Contract Act (Cap. 23) (K.) and Trade Disputes Act, s. 10 (4) (K.).

[3] Master and servant – Contract of Service – Retirement benefits – Award of Industrial Court of retirement benefit to “Kenyanised” employees held valid.

Editor’s Summary

The claimants, a trade union, applied to the Industrial Court for interpretation of an award made by that court relating to retirement benefits for employees which award had been included in an agreement between the parties. The Industrial Court issued an “interpretation” holding that non-citizens of Kenya who lost their jobs as a result of the policy of “Kenyanisation” were eligible for retirement benefits. The respondents, an employers association, brought this application to the High Court for certiorari to quash the interpretation of the Industrial Court, arguing that it was inconsistent with the provisions of the Frustrated Contracts Act 1943 of the United Kingdom (applied to Kenya by the Law of Contract Act) and was therefore unenforceable by virtue of s. 10 (4) of the Trade Disputes Act. It was common ground that the contracts of the employees concerned had in fact been frustrated. It was also argued that the interpretation was really a revised award.

Held –

- (i) the interpretation was not inconsistent with the provisions of the Frustrated Contracts Act because the agreement between the parties in fact provided for the contingency of Kenyanisation;
- (ii) the interpretation was not a revised award.

Application refused.

No cases referred to in judgment.

Judgment

Mwendwa CJ: In the Industrial Court’s cause 17 of 1968 the parties were the Kenya Motor Engineering and Allied Workers’ Union and Motor Trade and Allied Industries Employers’ Association (therein, and, for the sake of uniformity and continuity, hereinafter also respectively referred to as the claimants and respondents).

One of the issues in dispute between the parties in the said cause 17 was issue described as retirement benefits. The Industrial Court made the following award in respect of it:

“Retirement Benefits:

The court awards that the present clause should be amended so that those employees who lose their job other than for disciplinary reasons or who die (their estates) should not forfeit this benefit.”

The claimants, being entitled to do so by virtue of the provisions of s. 10 (5) of the Trade Disputes Act (Cap. 234), applied to the Industrial Court for interpretation of the award relating inter alia to retirement benefits. The Industrial Court delivered its ruling or interpretation on 17 March 1969. It referred to the award made by it in its cause 17 of 1964 under the heading of “Gratuity on Retirement or Resignation”, and also pointed out that subsequently the parties appeared before it in cause 58 of 1966 but this issue was not in dispute, also that the court’s award was incorporated in an agreement between the parties which is set out in the ruling. Clause 1 of this agreement provided that when employees are retired on reaching the retirement age or on the grounds of ill-health they shall get certain payments which are mentioned. The Industrial Court further said:

“The position of those non-citizens who would be losing or who have lost their jobs as a result of Government Policy of Kenyanisation is different. These people would be losing their jobs for reasons other than disciplinary and as the court’s award stands at present they are clearly eligible to their retirement benefits.”

The Respondents then applied, also under s. 10 (5), for a further determination of the court’s ruling, but their application was rejected on the ground that the matter was already finally determined on 17 March.

In the present case before us certiorari was moved on behalf of the Respondents to bring up and quash the Industrial Court’s interpretation made in cause 17 of 1968 on 17 March 1969, on retirement benefits on the following grounds:

- “1. That the interpretation is inconsistent with the written law of Kenya, namely the Law Reform (Frustrated Contracts) Act, 1943 (6 & 7 Geo. 6, c. 40) of the United Kingdom (hereafter referred to as the English Act), as applied in Kenya, by the Law of Contract Act (Cap. 23).
2. That the Industrial Court has no power to make an award, or interpretation contrary to the written law of Kenya, and in so doing has exceeded its jurisdiction.
3. That the Interpretation is null and unenforceable by virtue of Section 10 (4) of the Trade Disputes Act (Cap. 234).”

This part of our judgment which we are now delivering is in continuation of the pronouncement made by us at the close of the hearing before us that the Respondent’s motion was denied for reasons to be stated later.

Section 10 (4) of the Trade Disputes Act provides that an award shall not contain any provision which is inconsistent with the provisions of any written law relating to the terms or conditions of or affecting employment or labour, and any award containing any such inconsistent provision shall have effect as if such inconsistent provision had not been included therein.

Section 1 of the English Act provides for adjustment of rights and liabilities of parties to frustrated contracts. It comes into operation where a contract governed by English law has become impossible of performance or been otherwise frustrated, and the parties thereto have for that reason been discharged from the further performance of the contract; then the provisions of s. 1 which follow have effect in relation thereto but subject to the provisions of s. 2 of the Act to which we refer later.

The contracts which have or may become frustrated and referred to in the interpretation are of those employees who have or would become jobless as a result of Government's policy of Kenyanisation. There was unanimity among counsel appearing before us that such contracts have or would become frustrated for the reason stated. We have no desire to differ from this view of the matter.

It has been argued on behalf of the respondents that in such event no retirement benefits could be awarded on account of the contract and also because the benefits would not have been earned at the time of frustration. Another argument that has been adduced on behalf of the respondents is that the Industrial Court's award in 1968 did not give the employees any retirement benefits due to Kenyanisation, and, in this connection, in March 1969, the Industrial Court issued not an interpretation but a revised award.

In our view what the Industrial Court has said is not inconsistent with the provisions of any written law because we do not think the provisions of s. 1 of the English Act apply to contracts which have or would become frustrated here. In our opinion the application of the provision of s. 1 of the English Act is excluded by the provisions of s. 2 (3) thereof which reads as follows:

"2(3) Where any contract to which this Act applies contains any provision which, upon the true construction of the contract, is intended to have effect in the event of circumstances arising which operate, or would but for the said provision operate, to frustrate the contract, or is intended to have effect whether such circumstances arise or not, the court shall give effect to the said provision and shall only give effect to the foregoing section of this Act to such extent, if any, as appears to the court to be consistent with the said provision."

The essential element or pre-requisite for application of s. 1 is that the parties themselves must have failed to provide for frustration. If sagaciously they make provision for it, the section has no application except to the extent as its provisions appear to be consistent with the provision made by the parties themselves.

We consider that clause one of the agreement between the parties which we have already set out contains a provision which, upon the true construction thereof, is intended to have effect in the event of circumstances arising, as they have arisen here, which operate, or would but for the said provision operate, to frustrate the contract, and we must give effect to the provision. We also consider that frustration due to legislative prohibition to continue in employment, being akin to incapacity due to illness which was within the contemplation of the parties and which they expressly provided for, was also within their contemplation, for such prohibition prevents performance of the contract like illness, due to an unavoidable cause. The reference to ill-health in clause one is not exhaustive. It is merely one instance. The parties foresaw and they intended to make provision for contingencies which make the contract impossible of performance such as the one which has arisen. Neither do we think there is any provision in s. 1 of the English Act which appears to us to be consistent with the said provision made by the parties themselves and to which we should give effect. The situation which has arisen is within the scope of the said provision. It is the foundation for the said provision, i.e. impossibility of performance due to an unavoidable cause. The learned editors of Chitty on Contracts (23rd Edn.) para. 1318 state that s. 2 (3) of the Act applied only to the extent that it is consistent with any provision intended to cover the effects of frustration.

Even if the parties had not incorporated the said provision expressly in their agreement, it would still have taken effect by virtue of the provisions of sub-s. (6) of s. 10 of the Trade Disputes Act, which provides that, subject to the provisions

of that section, an award shall, as from the date that the award has effect, be an implied term of every contract of employment between the employers and employees to whom the award relates, so that the rate of wages to be paid and the terms and conditions of employment to be observed under the contract shall be in accordance with the award until it is varied by a subsequent award, or by agreement.

We consider that in a dispute referred to it the Industrial Court is empowered to decide terms and conditions of employment which include – they must include – the power to make provision in the event of frustration just as the parties themselves could provide for such an eventuality. The Industrial Court is substituted for the parties to settle the terms and conditions of employment for them. We also consider it simple logic that like the parties themselves the Industrial Court should be able to make provision to meet circumstances arising from frustration. We do not see that to do so would be inconsistent with any written law. In effect the award operates like a provision agreed between the parties. The English Act does not deny the right to contract freely in the event of frustration taking place.

We think we have made it plain and we reject the submission that the interpretation was a revised award. In our opinion the award made in 1968 was comprehensive and covered the type of frustration that has now arisen. We agree with the argument on behalf of the Industrial Court that the interpretation must be related back to the award. It is astonishing that either party should have gone back to the Industrial Court for interpretation of the award. For these reasons we refused the motion. The successful defendants will of course have their costs of the proceedings.

Application dismissed.

For the applicants:

Sir William O'Brien Lindsay (instructed by *Hamilton Harrison and Mathews*, Nairobi)

For the respondents:

Zool Nimji (instructed by *Shapley Barret Marsh and Co.*, Nairobi)

For the Industrial Court:

K. D. Potter, Q.C. (Special Legal and Constitutional Counsel) and *J. F. Shields* (Senior State Counsel)

Ebrahimji and others v Gulamabbas
[1970] 1 EA 439 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	16 January 1970
Case Number:	11/1967 (55/70)
Before:	Russell Ag J
Sourced by:	LawAfrica

[1] Trust and trustee – Incorporation – Application for alteration of constitution – No certification of trustees – Order a nullity.

[2] Trust and trustee – Incorporation – Minister’s powers only over trustees not over association appointing trustees – Trustees Incorporation Act (Cap. 147) (U.).

[3] Trust and trustee – Incorporation – Refusal – No effect on status of trustees in the association.

Editor’s Summary

Trustees were incorporated in 1928 under what is now the Trustees Incorporation Act. No certification of any change in the incorporated trustees had been made, nor could any register be produced.

A meeting of the society adopted a new constitution and application was made to the Minister for approval of the new constitution, which was granted. Thereafter it was alleged to the Minister that his order had been obtained by fraud. Without hearing the applicants the Minister revoked his order and purported to reapply the previous constitution. Appeal was filed against this last order of the Minister.

Held –

- (i) no application had been made by properly registered trustees and accordingly the Minister’s order was a nullity;
- (ii) on appeal the court may make such order as is proper.

Observations on the power of the Minister to approve constitutional changes, and on the effect of the withdrawal of incorporation.

Appeal allowed.

No cases referred to in judgment.

Judgment

Russell Ag J: This appeal was filed pursuant to s. 16 (2) of the Trustees Incorporation Act (Cap. 147) and in accordance with the Trustees Incorporation (Applications and Appeals) Rules against an order made by the Minister of Mineral & Water Resources and formally expressed in an instrument dated the 26 July 1967.

Before dealing with the issues raised in the memorandum of appeal it is necessary to appreciate the reasons for enacting the original Land (Perpetual Succession) Ordinance and its successor the Trustees Incorporation Act and to distinguish between trustees incorporated under those statutes, ordinary trustees and the bodies or associations of persons for whom those trustees, statutory or otherwise, held the trust property. The original Ordinance was clearly intended to overcome the difficulties and expense inherent in the transfer of land vested in trustees on change of trustees. The scope of the legislation was extended by the present Act, but to qualify for incorporation the trustees must be lawfully appointed by a body or association of persons established for any religious, educational, literary, scientific, social or charitable purpose. Even

though the trustees who wish to be incorporated are qualified for incorporation the Minister has wide discretionary powers as to whether he will grant a certificate of incorporation and in exercising that discretion he will have regard to the extent, nature and objects and other circumstances of bodies or associations who have appointed the trustees and whether such incorporation is expedient.

It is for those reasons that in an application for incorporation particulars must be given of the objects and rules and regulations of the body or association which appointed the trustees, but even if the Minister is not satisfied and refuses to grant a certificate of incorporation the trustees will nevertheless remain trustees although without the benefits of incorporation. Alternatively the Minister, if not satisfied with the rules and regulations as to the qualifications and number of trustees, their tenure and avoidance of office and the mode of appointing new trustees, may issue a certificate of incorporation subject to specific conditions as to those matters which, as far as the incorporated trustees are concerned, over-ride any regulations made by the body or association which appointed them. In the instant appeal no such special conditions were prescribed by the Governor in the original certificate of incorporation in 1928 and he accepted the relevant rules annexed to the application. He also accepted the names of the four original trustees who thereby became incorporated.

It is therefore clear that neither the Governor originally nor the Minister subsequently had any jurisdiction over the rules or regulations of any body or association which had appointed the trustees who had applied for incorporation but he could impose special conditions if they wished to become incorporated under the statute. The trustees are the persons who make the application and if any conditions proposed by the Minister were not acceptable they remained ordinary trustees in the same manner as if the application had not been made.

Section 16 (1) of the Act empowers the Minister to make orders regarding the constitution and conduct of a corporate body or in regard to the trustees thereof but this is a very different matter from granting him power to alter by order the objects and rules and regulations of the body or association which appointed the trustees who subsequently became incorporated. It is arguable that the Minister has the power to reconsider his original acceptance of the body or association's rules as to the appointment or removal of trustees and intimate to the incorporated trustees that he intends to or does in fact attach new special conditions. If the incorporated trustees were not prepared to accept the suggested amendments to their constitutions or conduct they would be entitled to relinquish the benefit of incorporation and revert to their original status of ordinary trustees after consultation with the body or association which appointed them.

I am strengthened in my view by the fact that the section goes on to grant the Minister the power to authorise any variation in the composition or constitution of the corporate body or in the rules or other instruments regulating the same. The application for authorisation would have to be made to the Minister normally by the registered trustees for the time being or if made by an alleged "interested party" then notice would have to be given to the registered trustees who would obviously be vitally interested.

I will now deal briefly with the facts. It is alleged by the appellant that on the 13 June 1967 a meeting was held under the chairmanship of Mr. E. K. Bharmal at which a "1967" constitution was adopted. On the 27 June 1967 an application was made to the Minister for his approval of the new constitution which resulted in the Minister's order dated the 30 June 1967 approving the revocation of the 1928 constitution and the adoption of the 1967 constitution.

Although it has not been produced in this court there is a copy of a letter

in the record of the appeal to the Court of Appeal dated the 29 June 1967 purporting to have been written by direction of “The Managing Committee of the Dawoodi Bohra Jamaat Corporation” objecting to the application dated the 27 June 1967 but despite that letter the Minister on the 30 June 1967 signed an order as above stated.

On the 14 July 1967 a person purporting to be the secretary of the “Dawoodi Bohra Corporation” addressed a letter to the Minister enclosing what purported to be an affidavit sworn by “the majority of the members of my community” and on the 15 July 1967 the Minister addressed a letter to the “Secretary” stating that after “investigations and interviews” he had that day issued an order revoking his “decision” of the 30 June 1967.

The letter of the 15 July appears to have reached the respondent’s group who made an application on the 18 July 1967 for authorisation for amendments to rules 9 and 23 of the 1928 constitution. This was followed by a further application dated the 25 July 1967 for an order revoking the order of the 30 June 1967, substantially on the grounds that it was obtained by fraud, misrepresentations and untrue statements and “some of the clauses in 1967 constitution are undesirable and not in the interest and policies of our Government”. These two applications do not purport to have been made by any registered trustee nor were those trustees notified.

The Minister on the 26 July 1967 then made the order (the subject matter of this appeal) wherein he recites the order of the 30 June 1967 made on an application on behalf of the Registered trustees and the applications dated 18 and 25 July 1967 also allegedly made “on behalf of the said registered trustees”. The operative part reads: “The Minister hereby approves the revocation of the said Constitution (1967) and the substitution therefor of the said objects and rules amended and referred to in the said application dated the eighteenth day of July, one thousand nine hundred and sixty seven (i.e. the 1928 rules).”

The two factions of the Dawoodi Bohra community appear to regard this appeal as the battle ground on which to fight out a communal issue as to whether they as a religious community are bound by the 1928 or the 1955 or the 1967 constitutions but such belief is not, in my opinion, justified. Neither the Minister nor this court should be regarded as a fairy godmother to settle their domestic and internal disputes – all we are concerned with is the corporate body of trustees and the mere fact that the Minister has authorised or not authorised a change in the instrument regulating the composition or constitution of that corporate body does not affect the beliefs or behaviour or rights of the members of the community.

The Registrar requested the Minister to furnish this court with all papers material to the application upon which the order appealed against was made and the relevant file of papers was placed before me at the hearing. To my astonishment there is no record of the certification of any changes of trustees pursuant to s. 5 of the Act and counsel were unable from the Bar to produce to me any satisfactory evidence or register which would establish the names of the present incorporated trustees. As all the assets of the community are vested in the incorporated trustees it appears to me to be vital to establish who those trustees are prior to hearing any application on their behalf. The only evidence I have on record is that Mr. E. K. Bharmal in his affidavit sworn on the 18 August 1967 deposed that he had been one of the registered trustees since the 28 August 1956.

If there is any doubt as to who are the registered trustees a plaint should be filed in the High Court in its original jurisdiction pursuant to s. 15 of the Act and r. 3 of the Appeal Rules to resolve that doubt. This procedure would enable a court of law to settle most of the matters in dispute and avoid the

necessity of calling on the Minister to act as a referee but without judicial powers or specific rules of procedure. If the respondent had felt aggrieved by the order of the 30 June 1967 it is significant that instead of exercising his right of appeal he lodged a formal application to the Minister dated the 25 July 1967 alleging fraud, misrepresentations and lies on the part of the appellants and the Minister on the very next day, the 26 July 1967, granted the application, signed an order with a copy of the said application attached, and thereby by necessary implication branded the appellants as fraudulent liars without giving them any opportunity of calling for particulars of and refuting those allegations.

It is also clear from the order of the 26 July 1967 that the Minister was under the mistaken impression that the applications of 18 and 25 July 1967, had been made on behalf of the registered trustees even if he was unaware of their personal identities. This was a fundamental error as in fact the registered trustees of the Dawoodi Bohra Jamaat Community Kampala had not made any applications and under those circumstances I have not the slightest doubt that the order was a nullity. The same comment would have applied if there was an appeal before this court against the order of the 30 June 1967 but unfortunately the respondent elected not to appeal but merely to apply to the Minister and I am not therefore empowered to make any order in relation thereto.

Even if the order of the 26 July 1967 is not a nullity for the above mentioned reasons it is so obviously contrary to natural justice it is unnecessary to cite decisions of our courts or the courts of England and I hold that it was in fact contrary to natural justice. The formal application alleging fraud and deceit on the part of the appellants was dated the 25 July 1967 and an order impliedly accepting those allegations was signed and filed in a public record on the 26 July 1967 without any notice to the appellants.

As the Minister is empowered to make such orders under s. 16 (1) of the Act as may seem to him proper and s. 16 (2) grants a right of appeal there-against by an aggrieved party I presume this court likewise is empowered on appeal to make such order as it deems proper. The appellants have, without being heard, been branded as fraudulent liars on a public record and I therefore rule that the order is a nullity and I direct that it and the annexures thereto be removed from the file. I further give it in terms of strong recommendation to the Minister to reconsider his order of the 30 June 1967 but if he wishes to make any further order in relation thereto he should give both parties an opportunity of being heard and give valid reasons for doing so. I would further suggest that he insists on due compliance with s. 5 of the Act as to the certification to him of the registered trustees so that it can be ascertained who they are or, in the event of any genuine dispute, the matter can be resolved by this court on a plaint filed under s. 15 of the Act.

If owing to internal disputes which cannot be resolved by due process of law then the Minister will no doubt consider the advisability of withdrawing the benefit of incorporation from the trustees so that they, whoever they may be, can carry on in such manner as they may wish without burdening the Minister with their problems.

For these reasons this appeal is allowed with costs in terms as above stated.

Appeal allowed.

For the appellants:

E. F. N. Gratiaen, Q.C. and A. Korde (instructed by Korde & Esmail Kampala)

For the respondent:

East African Railways & Harbours v Lalani
[1970] 1 EA 443 (HCU)

Division: High Court of Uganda at Kampala
Date of judgment: 17 January 1970
Case Number: 198/1967 (58/70)
Before: Mukasa Ag J
Sourced by: LawAfrica

[1] Damages – Tort – General damages – Improper to include staff salaries which would have been paid regardless of accident.

[2] Evidence – Negligence – Contributory Negligence – Some evidence must be led.

[3] Negligence – Duty of care – Duty of railway engine driver – Duty to watch for signals and objects stopped on track ahead, but no duty at properly maintained crossing to watch for crossing motorists.

[4] Negligence – Railway – Level crossing – Public road crossing – Duty of reasonable care to prevent danger at crossing.

[5] Railways – Level crossing – Public road crossing – Duty to take reasonable care to prevent danger at crossing.

Editor's Summary

The trailer of defendant's motor lorry collided with the plaintiff's train at a level-crossing on a public road a short distance from Tororo. The engine overturned together with several wagons, killing the engine driver and fireman. The plaintiff sued for special and general damages arising out of the defendant's driver's negligence. The defendant denied negligence and alleged contributory negligence on the part of the engine driver. No evidence was led by the defendant tending to establish contributory negligence. There was evidence that the brakes of the truck were faulty and that the truck did not slow down for the crossing.

Held –

- (i) the railway has a duty to use reasonable care to ensure that level-crossings on public roads are reasonably safe;
- (ii) the plaintiff on the evidence exercised such care;
- (iii) the duty of the engine driver was to watch the track ahead for objects on the tracks and to watch for and observe signs, and not to watch for approaching motorists (*Lloyds Bank v. British Transport Commission* and another (2) followed);
- (iv) there was no evidence of contributory negligence;

- (v) negligence of the defendant's driver was proved;
- (vi) general damages do not properly include staff salaries which would have been paid regardless of the accident;
- (vii) nominal general damages of Shs. 100.00/- awarded.

Judgment for the plaintiff.

Cases referred to in judgment:

- (1) *Lloyds Bank v. Railway Executive*, [1952] 1 All E.R. 1248.
- (2) *Lloyds Bank v. British Transport Commission & Another*, [1956] 3 All E.R. 291.
- (3) *Trznadel v. British Transport Commissioner*, [1957] 3 All E.R. 196.
- (4) *James v. Transport Commission*, [1958] E.A. 313.
- (5) *Melarem F. Sharma v. The General Manager* (Tanzania Civil Suit 10 of 1966) (Unreported).

Judgment

Mukasa Ag J: On 28 June 1965 at about 8.15 a.m. the plaintiff's train which was bound for Mbale from Tororo collided with the trailer of the defendant's motor lorry two and a half miles away from Tororo Township, at a level crossing.

As a result of this accident, the engine of the train overturned, with several wagons, killing both the engine driver and the fireman. The plaintiff then brought this suit claiming Shs. 189,004/40 as special damages arising out of the defendant's driver's negligence. They also claimed general damages. The defendant denied any negligence on the part of his driver. He alleged negligence on the part of the engine driver, though he did not counter-claim. In the alternative the defendant claimed contributory negligence of both driver of the railway engine and his own driver as the cause of the accident.

The defendant's defence was drawn and filed by a lawyer, but no lawyer appeared to argue this defence. I understand the defendant changed his first lawyer who drew up the defence to another and yet another, and despite the last adjournment given him to engage one, he was unable to do so. Then he had to conduct his own defence.

The plaintiff based its claim on negligence relying on the defendant's driver's common law duty to drive the defendant's motor lorry on the public road with due care and attention.

As I have stated there have already been similar suits brought in Kenya and Tanzania; namely *James v. Commissioner of Transport*, [1958] E.A. 313 and *Melaram F. Sharma v. The General Manager* (unreported) Civil Suit 10 of 1966 of Tanzania.

In cases of crossings over a public road the railway authorities have a duty to ensure the safe operation of the railway. They must be considerate about some people who will be crossing without knowing that trains also cross at level. It is not like a case of an accommodation crossing where the person does use it, well aware that trains do cross and they must approach it with care.

This observation was well made by the Court of Appeal in England in the case of *Lloyds Bank v. Railway Executive*, [1952] 1 All E.R. 1248, at p. 1253 (*per* Denning, L.J. as he was then).

"It is, I think, now clearly established that the defendants must take reasonable care to prevent danger at these crossings, and this is an obligation which keeps pace with the times. As the danger increases, so must their precautions increase. The defendants cannot stand by while accidents happen and say:

'This increased traffic on the road is no concern of ours.' It is their concern. It is their trains which help to cause the accidents, and it is often the increased number of trains which increases the danger as well as the increased traffic on the road. The defendants must, therefore, do whatever is reasonable on their part to prevent the accidents."

With this principle in mind I turn to consider the facts pleaded in the plaint and the evidence in support of them.

Mr. Shabani Abdala Rahim Sozegwa, the plaintiff's surveyor told the court that he visited the scene of the accident, at mile 2.6 from Tororo. It was all a cleared-up place with grass less than a foot tall. He made a sketch plan of the locality.

He found all warning marks were erected along both the railway line and along the road from Mbale to Tororo.

Along the railway line, he found at a distance of 681 feet from the level crossing a whistle board.

There was also a sleeper mark erected at a distance of 304 feet from the level crossing. There were also grade-points indicating the gradient of the railway line. These signs were on either side of the level crossing.

Along the road, he found erected at a distance of 367 feet from the level crossing “the advance warning” mark. Then a second mark of a railway sleeper was also erected at 302 feet from the crossing. There was also a third mark of the level crossing situate about 20 feet from the actual crossing. These three sets of marks were on either side by the road. The railway crossing also was at a straight patch of the scenery, but the road slopes down as one goes from Tororo to Mbale. This witness marked all these signs on the sketch.

Mr. Gordon Katende, who was the ticket examiner travelling on this train also testified that the train was proceeding along at its normal speed, which on this section is only 30 m.p.h. He was in the 2nd class passenger compartment. He heard three long whistle blasts blown by the driver. The next thing he felt was a strong jolt which brought the train to a standstill. On coming out he found the engine had hit and smashed a trailer on the level crossing. The engine had overturned as had about seven carriages. He could not see the driver or the fireman.

Fortunately the carriages which overturned were not passenger carriages and no passengers were hurt.

Kenneth Francis Owen the shed master at Tororo told the court that the train left Tororo at 8.00 a.m. As is the routine it had been tested and the engine was started at least 45 minutes before it left the station. The efficiency of the braking system was 100 per cent. After only 15 minutes he received information of the accident at the level crossing about 3 miles from Tororo.

On reaching there he found both the driver and the fireman had been killed and were still trapped in the engine-room.

Miss Faice Norah Acien was cultivating her shamba very near the place of the accident and just 50 feet from the railway lines. This witness informed the court that she had seen the motor lorry driving towards Mbale from Tororo. It had parked some distance away. She then heard the whistle of the train which was sounded three times. She stopped cultivation to watch the passing train.

She then noticed the motor lorry coming to cross the lines at full speed. She raised her hands to warn the motor lorry driver to stop, but the motor lorry did not stop. It drove past the railway lines but before it was completely clear the trailer was hit by the train. The trailer was broken off. It was loaded with drums of some stuff which burst. Then the train overturned. The other part of the motor lorry drove off without stopping.

It is the plaintiff's case then that the defendant's driver drove this motor lorry in such manner as to be the sole cause of this accident, having failed to stop and let the train cross first.

The plaintiff also called Lawrence Okoth, the permanent way Inspector, who was then responsible for that section of the line. He informed the court that he used to inspect these lines once a week. That he had other staff under him who checked on the line every day, and if anything was wrong with the line they reported it immediately. That he had not received any report, since his own observation which he had

made the week before the accident.

The motor lorry which was involved in the accident was found abandoned some distance away and it was taken back to Tororo Police Station. Mr. Joseph Tamale who found it informed the court that it could not brake at all. He had to tow it back to the police station. He also saw it towed away later on by the owner to whom he gave it after it had been examined by Mr. Yosia Mukibi the Inspector of vehicles.

Lastly, Inspector Y. Mukibi who examined the defendant's motor lorry testified that this motor lorry had no working foot brakes before the accident. Its speedometer was also out of order. He noticed the chassis and the rear number plate unit were damaged. In his opinion this motor lorry was in defective mechanical condition and likely to cause accidents.

Unfortunately, the defendant's driver who was driving this motor lorry never testified. It is not known why he did not hear the whistle of the approaching train, for none of the crew of the motor lorry testified. The defendant was not on this lorry. It seems the defendant was only pleading as to his misfortunes which he experienced after this accident and not as to his liability at all.

However, be that as it may, I am not prepared to take his word that his driver was only 50 per cent negligent. It is only a matter for speculation and not supported by evidence as it should be.

Taking all the evidence together I find that the train driver did whistle on approaching the level crossing. Possibly the defendant's driver heard the whistle but he thought he could cross first. Alternatively he realized he could not cross the rails before the train, but he had no brakes to bring the lorry to a standstill.

Whatever be the position, I think the defendant's driver failed to keep a proper look out on his approaching the level crossing which was situate at a clear patch of the road.

Whether the fireman and the driver saw the motor lorry and were also negligent in not bringing the train to a halt is also a point to consider.

In the case of *Trznadel v. British Transport Commission*, [1957] 3 All E.R. 196, the Court of Appeal had this to say at p. 198 *per* Morris, L.J.

"[A]n engine-driver's duties are entirely different [from that of an ordinary driver]. The engine-driver is driving on fixed tracks; he is driving on private property; he has, of course to watch for the signals, and he has to have in mind that he is driving to a schedule of time. He must take all reasonable steps that he can to ensure that he stops if there is any obstacle ahead. It is not, however, like a roadway; and those who have permission to use a railway track use the track with the knowledge that a train may be coming which is being driven at speed and cannot be pulled up in a very short space of time, and which is being driven by an engine-driver who cannot have that full check on everything that is on the track that the driver of a motor car on a road must be expected to have."

It is therefore apparent the engine driver in our present case was watching for the signals, that is why he whistled. Even if he saw this motor lorry when the train was almost colliding with it, he is not to blame anyway.

It would be another matter, if the engine driver collided with an object which was apparently an obstacle on the track, for his duty is to observe such from afar. This was a crossing motor lorry.

In *James* case (*supra*), it was held by the Supreme Court of Kenya that the engine driver had a duty to keep a proper look out on this particular crossing for some special reasons. This level crossing had not been improved by the

defendants for a considerable time, despite the fact that it was known to them to be a real danger to safety. There were objects obscuring visibility. In our present case the plaintiff had maintained the area and kept all the grass trimmed at less than a foot tall, and had erected all the necessary signs along both the railway track and the road.

In approaching this matter, I feel justified in following the reasoning of Morris, L.J. in *Lloyds Bank v. British Transport Commission & Another*, [1956] 3 All E.R. 291, at p. 298.

“I think it is undesirable to seek to equate the approach to this matter to that made to the driving of a motor car along a public thoroughfare. The driving of a train and the driving of a motor car are two quite different things. A train has priority on its track; it is being driven on a fixed track; it is normally expected to proceed to a time schedule; the driver has obligations to look out for signals by which in the main the running of the train along the track is controlled. Of course, he has a duty to do all that is reasonable to keep a look-out along the path that he will travel, and to watch for any obstructions that there may be on the line. But I think that it would be too exacting to require him to look sideways to see whether something was approaching from a side road. He has the responsibilities of seeing that his engine is in proper condition and that the signals permit of his progress.”

I therefore find no negligence on the part of the train crew. I find that the accident was caused by the negligence of the defendant's driver.

It remains then for me now to consider the damages. There was evidence that the cost of repairs to the track and to the engine amounted to Shs. 132,001/80 and Shs. 11,920/20 respectively. There was also evidence that the cost of transporting the stranded passengers amounted to Shs. 5,451/00.

Lastly, there was evidence to show that compensation paid by the plaintiffs to the relatives of the killed engine-driver and the fireman totalled up to Shs. 39,631/-. Therefore the total expense the plaintiff met as the result of this accident was Shs. 189,004/40. This sum of course may or may not have included the salaries which were paid to the staff-members of the plaintiff who supervised the repair works and the depreciation of the value of the damaged engine. Possibly that is why there is a prayer also for general damages. But be that as it may, this court was not at all assisted as to what this general damage may have been as no evidence was led. In such circumstances then it becomes very difficult for the court to decide the adequate damages which should be awarded to the plaintiffs.

As far as the staff salaries are concerned, it is a matter of annual budget of the operation-costs which the plaintiffs would have to meet even if the accident did not occur.

This being the case, I shall only award a nominal sum on top of the sum of the special damages.

I award Shs. 100/- as general damages to the plaintiff together with the costs of this suit.

Judgment for the plaintiff.

For the plaintiff:

J. Khaminwa and Wekesa

The defendant appeared in person.

Beard and another v Republic

[1970] 1 EA 448 (HCK)

Division: High Court of Kenya at Nairobi
Date of judgment: 8 January 1970
Case Number: 1203 and 1204/1969 (79/70)
Before: Mwendwa CJ and Wicks J
Sourced by: LawAfrica

[1] *Criminal Law – Assault – Causing actual bodily harm – Arrest of offender – Tying although no attempt to escape – Criminal Procedure Code (Cap. 75), ss. 21, 24 (K.).*

[2] *Criminal Practice and Procedure – Arrest – By private person – More force than necessary used – Criminal Procedure Code (Cap. 75), ss. 21, 24 (K.).*

[3] *Criminal Practice and Procedure – Arrest – By private person – Offender not handed over to police immediately – Unnecessary delay – Criminal Procedure Code (Cap. 75), s. 35.*

Editor's Summary

The first appellant used his land for activities relating to game conservation and the second appellant was employed by him to prevent poaching. The second appellant surprised the complainant setting a snare on the first appellant's land at a place where a rare antelope had been found dead. The complainant made off, but was confronted by the appellants at his place of work, where he admitted the offence and agreed to accompany the appellants to the place. When near the place, the complainant retracted his confession and the appellants decided to arrest him. The complainant was made to sit down and was tied to a tree with wire snares, but care was taken and only superficial injuries were caused. The first appellant took photographs of the snares and the scene and took them for urgent processing in order to hand them over to the police together with the complainant.

The appellants were convicted of assault causing actual bodily harm and wrongful confinement and sentenced to 18 months' imprisonment and 12 strokes of the cane. The magistrate recommended the deportation of the first appellant.

Held – On appeal

- (i) the complainant had made no attempt to escape, and he should not have been tied up;
- (ii) there had been unnecessary delay in handing the complainant over to the police after his arrest;
- (iii) the sentences were excessive, and based on an erroneous view of the facts.

Appeals allowed against sentence.

Judgment

The judgment of the court was read by **Mwendwa CJ**: The appellants were convicted by the Resident Magistrate Nairobi, on two charges, the first of assault causing actual bodily harm contrary to s. 251 of

the Penal Code and the second of wrongful confinement contrary to s. 263 of the Penal Code. They were each sentenced to serve a term of imprisonment of 9 months and to receive 12 strokes of the cane on the first charge, and to 9 months' imprisonment on the second charge the sentences of imprisonment to be served consecutively. They appeal against their convictions and the sentences. The appeals were consolidated.

There is little dispute on the facts. The first appellant owns about fifty acres of land in the Langata/Karen area and the incident out of which the charges arose took place on the land. The first appellant obtained authority to purchase the land in 1960 for the purpose of activities relating to game and he has carried on these activities since then. In May 1968 the first appellant had reason to believe that poaching on a considerable scale was taking place on the land and, with the intention of preventing the poaching he employed the second appellant who had for many years worked in the Game Department on anti-poaching activities. During the two weeks before the incident the second appellant found 32 wire snares, and on the evening before the incident, he found a dead suni in a snare. He also found 9 snares in the vicinity. On the same evening the appellants went to the camp of a Mr. Cowie, who owned adjoining land, and there they saw the complainant who was employed by Mr. Cowie, the complainant's wife, and other employees of Mr. Cowie. The object of the visit was to obtain the assistance of Mr. Cowie's servants in combating the poaching and they gave the complainant Shs. 10/- as earnest for a promised Shs. 100/- reward to be paid on a poacher being apprehended.

Early on the following morning the second appellant secreted himself near the place where the dead suni had been found and at about 6.00 a.m. the complainant arrived, crouched down and proceeded to set the snare from which the dead suni had been taken. The second appellant surprised him in the act, whereupon the complainant, who was armed with a panga and a rungu became aggressive and went off. The first appellant arrived at about 10.30 a.m. and he and the second appellant went to Mr. Cowie's camp where the second appellant identified the complainant from amongst a group of Mr. Cowie's employees as being the poacher. After a long discussion the complainant admitted the offence and agreed to take the appellants to the place where the suni had been snared. When they were about 10 feet from the place the complainant retracted his confession. The appellants then decided to detain the complainant at the place where the suni had been snared. The complainant was made to sit down and put his hands behind his back and, using the wire snares that were there, his hands were secured to a tree, his legs were secured but not to a tree, a wire was put round his chest and a gag was put in his mouth. The first appellant then took photographs of the snares and of the scene and hastened off, telling the second appellant to remove the gag, which had been used to scare the complainant. The first appellant said that his intention was to complete the evidence by having the photographs developed, and then to take the complainant and the evidence to the police.

There is little conflict in the evidence. The complainant, and one of the men who released him, said that he was also tied by his neck to the tree with wire, and they, and Inspector Francis Kiuchi, said they saw a mark on the appellant's neck. Dr. L. J. Lobo a Police Surgeon, who examined the complainant said that although the complainant complained of a pain on the side of the neck he could find no marks there. The complainant said that before he was tied up the first appellant struck him with his fist on the chin, this the appellants denied, but Dr. Lobo found an abrasion on the left side of the chin and a bruise. The first appellant said that he used the complainant's jersey to protect the wrists from the wire and it seems that was so for Dr. Lobo was of opinion that wire had not been used to tie up the complainant or the injuries would have been more extensive, and the injuries were consistent with rope having been used. Dr. Lobo described the complainant's injuries as being entirely superficial.

The place where the complainant had been tied up was within shouting distance of Mr. Cowie's camp and about 2.30 p.m., the complainant shouted and two of his fellow employees came and released him. They then went to Hardy Police Post, taking the wire bonds with them, arriving at about 3.30 p.m.

and reported the matter to Inspector Kimeli. Inspector Kimeli went with the complainant to the first appellants' house and found the appellants there.

The first appellant said that leaving the complainant he went direct to the premises of the Nairobi Photo Furnishers, where he knew the technicians and asked for the films to be developed and prints made as soon as possible. Mr. Quraishy a director of the Nairobi Photo Furnishers said that when the first appellant arrived he was in a hurry and wanted attention promptly, and said he wanted to take photographs to the police. A technician was assigned to the work and told to put everything aside and give the first appellant complete priority. Obtaining the prints the first appellant went straight back to his house and arrived at the same time as did Inspector Kimeli and the complainant.

The defence of the appellants was that the complainant had been caught red handed in the commission of an offence relating to poaching game, the complainants arrested him, using no more force than was necessary to affect the arrest, and he was restrained whilst the first appellant finalised the evidence, the intention being to then hand the complainant and the evidence over to the police.

The magistrate in his judgment found that the complainant was a poacher and that the second appellant had seen the complainant setting snares on the first appellant's land. The magistrate also found that the appellants acted within the law in detaining the complainant. With these findings we agree. We must refer to the law governing the rights of a member of the public to affect an arrest and the duties attached to the exercise of that power. Sections 21, 24 and 35 (1) of the Criminal Procedure Code are relevant and these provisions are:

- “21(1) In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.
- (2) If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police officer or other person may use all means necessary to effect the arrest.
- (3) Nothing in this section contained shall be deemed to justify the use of greater force than was reasonable in the particular circumstances in which it was employed or was necessary for the apprehension of the offender.
- 24. The person arrested shall not be subjected to more restraint than is necessary to prevent his escape.
- 35(1) Any person arresting any other person without a warrant shall without unnecessary delay make over the person so arrested to a police officer, or in the absence of a police officer shall take such person to the nearest police station.”

Mr. Salter, who appeared for the appellants, advanced very persuasive argument which he submitted established that the appellants had not exceeded their powers of arrest and detention but, looking at the evidence in relation to the provisions we have set out above, their case is hopeless. On the undisputed facts there is overwhelming evidence of the guilt of the appellants of the offence with which they were charged. It is not in dispute that the complainant agreed to go into the forest. He stopped when near the place where the snares had been found. If this was the point where the arrest was made, and it seems it was, the complainant submitted to the custody within the meaning of s. 21 (1) of the Code with the result that there was no justification to touch him, and the appellants should then, without delay, have handed over the complainant to a

police officer or have taken him to the nearest police station, so complying with the provisions of s. 35 (1) of the Code. The appellants exceeded their authority by binding the complainant, which was the assault, and by detaining him which was the wrongful confinement. The appeals of each of the appellants in respect of the charges must be dismissed.

Turning now to the appeals against sentence, the magistrate in his judgment said:

“The accused persons acted well within the law in detaining P.W.1 and in taking him to the forest so that he could there point out the snare he had set. It was proper that such snares should be removed as they were a danger to the animals in the forest. There was however, no justification whatsoever, having regard to the circumstances and to the law, for tying up the accused. It is clear that P.W.1 didn’t resist while in the forest and that he suggested that the accused persons should hand him over to the police. The accused persons had all the opportunity and all the facilities for reporting to the nearest police station and taking P.W.1 to that station. At that point, there was sufficient evidence on which P.W.1 could be prosecuted for an offence or offences under Protection of Wild Animals Act.”

With this we agree. The magistrate continued:

“I am satisfied that the accused persons tied up P.W.1 (the complainant) and left him in the forest as a punishment. The action of both accused in this respect was born of malice and had nothing to do with obtaining evidence for some future prosecution.”

and later in his judgment the magistrate said:

“In my considered opinion, there was no particular hurry on the part of the first accused regarding his processing etc. of the films. If he was given priority it had nothing to do with the fate of P.W.1 (the complainant).”

With respect to the magistrate, we cannot find that these statements are supported by the evidence. As far as the latter statement is concerned the evidence of the first appellant was that he rushed off to have the films developed and prints made, and the evidence of Mr. Quarishy, a director of Photo Furnishers, Nairobi, was that the first appellant arrived in a hurry and wanted attention promptly, and that a technician was assigned to the work and the firm set aside everything else “and did that for him. Complete priority was given”. Further Mr. Quarishy said that the first appellant spent two or three hours in the studio and that he wanted to take the photographs to the police. Again in his evidence the first appellant said that the films were developed and the prints made as quickly as possible and after that he returned to the camp where he arrived at the same time as did the police. None of this evidence was contradicted; it is consistent with the other evidence in the case, and it should have been accepted. Contrary to the finding of the magistrate, it establishes that the first appellant did hurry to have the films processed and printed, he was given priority in this and it directly related to handing over the complainant together with the photographic evidence to the police at the earliest possible moment.

As far as the former statement is concerned the evidence of the first appellant was that during the past nine years he had devoted his life to the conservation of game and the promotion of tourism in relation to game, that he had worked with the Game Department and been concerned with the prevention of poaching. The tenor of the evidence both of the prosecution and the defence was that the first appellant owned land which he maintained for the preservation of game, that he found evidence of poaching on his land, the complainant was caught in the act of a poaching activity, and then the efforts of both appellants was directed

solely to obtaining photographic evidence and then handing the complainant and the evidence over to the police. None of the evidence relating to these matters was contradicted, nowhere does malice on the part of either appellant appear and this should have been accepted by the magistrate.

Although on the face of it to have tied up the complainant with wire, to have gagged him and left him in the forest appears to have been a callous act, in fact the appellants took such care that the complainant should not be injured by the wire that Dr. Lobo, who examined him, could not believe that he had been tied up with wire and suggested rope had been used. Dr. Lobo described the complainant's injuries as being purely superficial. It was not suggested, even by the complainant, that the gag was intended to stop him shouting, the complainant said it did not inconvenience him and when he did shout, his shouts were heard in his employer's camp.

In our opinion this is a case where the first appellant, having found evidence of poaching on his land, and having found a suni, which we understand to be an animal of rarity and attraction, dead in a snare, and having found the poacher responsible for the death, his justifiable determination to bring the poacher to justice was taken too far. The second appellant acted under the influence of the first appellant and his actions, though equally not to be excused, were actuated by a desire to preserve game by the prevention of poaching.

The sentences imposed by the magistrate were based on erroneous view of the facts and were excessive. We consider that on the first charge, having regard to the circumstances of the case, the nature of the charge, and the character of the appellants, it would be appropriate that, on the first charge they be discharged subject to a condition and on the second charge a fine be imposed.

The complainant was found by the magistrate to have been detected in the act of a poaching activity, and as we have said, we agree with that finding. He did, however, suffer an assault and wrongful confinement and he should be compensated for those injuries.

On the first charge, sentences of imprisonment set aside and conditional discharges substituted. On the second charge, sentences of imprisonment set aside and fines of £500 and £25 respectively substituted. £250 to be paid to the complainant as compensation.

For the appellants:

C. Salter, Q.C., B. Georgiadis and R. D. C. Wilcock (instructed by *Archer & Wilcock*, Nairobi)

For the respondent:

K. Muttu

Okunda and another v Republic [1970] 1 EA 453 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	3 November 1969
Case Number:	2 and 3/1969 (82/70)
Before:	Mwendwa CJ, Chanan Singh J and Simpson J

[1] *Constitutional Law – Attorney General’s functions – Conflict with E.A. Community legislation – Constitution, s. 26 (K.). The Official Secrets Act, s. 8 (E.A.C.).*

[2] *Constitutional Law – Whether “Act of Parliament” in Treaty for East African Co-operation Act, s. 10 (3) includes the Constitution.*

[3] *Constitutional law – Other laws – Whether laws of the Community are other laws – Constitution, s. 3 (K.).*

[4] *Criminal Practice and Procedure – Consent – Official Secrets Act, s. 8 (E.A.C.) – Consent of Attorney General only required – Constitution, s. 26 (K.).*

Editor’s Summary

Prosecutions were brought by the Attorney General against two persons under the Official Secrets Act 1968 of the East African Community without the consent of the counsel to the Community.

Section 8 (1) of the Act provides that the consent of the counsel is necessary to a prosecution. The question whether the Attorney General could institute such prosecution without the consent of the counsel to the Community was referred to the High Court. On the reference counsel for the Community was allowed to appear. Section 26 (8) of the Constitution provides that the Attorney General is not subject to the direction or control of any person in the exercise of his functions, and it was submitted that s. 8 (1) of the Official Secrets Act was inconsistent with s. 26 (8) of the Constitution which prevailed since the East African Community is a creation of Parliament which is itself subject to the Constitution. Counsel for the Community argued that s. 8 (1) was purely procedural, and that any conflict should be resolved in favour of the Community legislation by reason of the requirement imposed by art. 95 of the treaty for East African Co-operation on the partner States to pass legislation to give effect to the treaty and to confer on Acts of the Community the force of law in their territories.

Held –

- (i) there is a conflict between the Attorney General’s functions and the requirement of consent by the counsel to the Community to a prosecution;
- (ii) there is no conflict between the treaty for East African Co-operation and the Kenya Constitution;
- (iii) “Act of Parliament” in the Treaty for East African Co-operation Act, s. 10 (3) does not include the Constitution;
- (iv) laws of the Community are other laws within the Constitution, s. 3, and are void to the extent of any inconsistency with the Constitution.

Prosecutions remitted for hearing.

Cases referred to in judgment:

(1) *Greco-Bulgarian Communities* P.C.I.J. Ser. B. No. 17, 32.

(2) *German Interests in Polish Upper Silesia* (Merits) (M.26) Series A, No. 7, 1 W.C.R. 510.

Judgment

The judgment of the court was read by **Mwendwa CJ**: Two cases were filed by the Attorney-General in the Resident Magistrate's court at Nairobi charging two persons with certain offences against the Official Secrets Act (Act 4 of 1968) of the East African Community. Since s. 8 (1) of that Act lays down that a prosecution shall not be instituted without the consent of the counsel to the Community, the point arose as to whether the prosecutions could proceed without such consent. At the request of the advocates appearing before him the Senior Resident Magistrate referred the matter to the High Court under s. 67 (1) of the Constitution of Kenya.

We decided to consolidate the two cases as the matters arising in both were the same and heard argument by all interested parties. Section 8 (1) of the Official Secrets Act of the community reads as follows:

“8(1) A prosecution for an offence under this Act shall not be instituted except with the written consent of the Counsel to the Community.”

No consent of the Community's counsel has been obtained and it is argued on behalf of the Attorney-General that no such consent is necessary and that in so far as s. 8 (1) requires the counsel's consent to prosecutions instituted by the Attorney-General it is invalid in Kenya because it is a clog on the powers given to the Attorney-General by s. 26 of the Constitution. Sub-s. (3) (so far as relevant) of that section reads as follows:

“3. The Attorney-General shall have power in any case in which he considers it desirable so to do –
(a) to institute and undertake criminal proceedings against any person before any court (other than a court-martial) in respect of any offence alleged to have been committed by that person;”

This provision, applies to “any case” and to criminal proceedings against “any person” in “any court” (other than a court-martial) in respect of “any offence”. Since the enactments of the East African Community are part of the law of Kenya, any offences against those enactments are covered by this subsection. This point is not contested by any of the parties before us and we shall say no more about it.

For the Attorney-General it is submitted that there is no question of the Attorney-General's having to obtain the consent of any other person and reference is made also to the following subsection of s. 26:

“(8) In the exercise of the functions vested in him by sub-sections (3) and (4) of this section and by sections 44 and 55 of this Constitution, the Attorney-General shall not be subject to the direction or control of any other person or authority.”

It is argued that s. 8 (1) of the Official Secrets Act of the Community is inconsistent with sub-s. (3) as read with sub-s. (8) of s. 26 of the Constitution which give the Attorney-General unfettered power to bring criminal proceedings in respect of offences. The Attorney-General is not, in this matter, to be subject to the “direction or control” of any other person or authority.

It is further argued that the East African Community has been set up by Parliament, so far as Kenya is concerned, under the Treaty for East African Co-operation Act 1967 (hereinafter referred to as the Treaty Act) which is the sole source of the legislative and other powers of the Community. Parliament itself is a creation of the Constitution and for this reason, a provision in a law

passed by the Community cannot possibly override a provision in the Constitution. Furthermore, the legislation passed by the East African Community is delegated legislation and must not go beyond the scope allowed by the Act which set up the Community, and certainly not beyond the scope permissible under the Constitution from which Parliament and all bodies created by it ultimately derive their powers.

The counsel for the Community does not accept these propositions. We shall now examine his contentions. First, he says that s. 8 (1), challenged by the Attorney-General, is merely a procedural provision requiring the counsel's consent to prosecutions and does not affect the Attorney-General's power to prosecute offenders. We think that the very fact that the Attorney-General cannot prosecute an offender without the consent of the counsel to the Community shows that he is subject to the "control" of that counsel. If the consent is refused, then he is effectively stopped from exercising a power given to him by the Constitution. There is, thus, a clear conflict between the provisions of the Constitution and an Act of the Community.

Secondly, if there is a conflict between the two laws – we have found that such a conflict exists – then the counsel for the Community asks that it be resolved in favour of the Community's legislation because the Community's power to legislate springs from the Treaty for East African Co-operation which was freely entered into by the three East African countries. He adduces the following arguments in support of this contention:

- (i) Article 95 of the treaty requires each of the partner States "to take all steps within its power" to pass legislation to give effect to the treaty and, in particular, "to confer upon Acts of the Community the force of law within its territory". We are of the opinion that Kenya has carried out its obligations under this article. The Treaty Act was passed with the sole object of giving effect to the treaty. Section 6 of that Act continues in force "the existing laws" and s. 8 (1) gives to future Acts of the Community "the force of law in Kenya".
- (ii) Article 4 of the treaty states that the member countries "shall make every effort to plan and direct their policies with a view to creating conditions favourable for the development of the Common Market and the achievement of the aims of the Community." The counsel for the Community thinks that, by this provision, the member countries agreed to surrender part of their sovereignty. But our attention has not been drawn to any law passed by Kenya which in any way militates against this provision. We shall deal later with s. 10 of the Treaty Act. It has not been suggested that there is any conflict between the treaty and any Kenya legislation or the Kenya Constitution. What is in question is a piece of legislation passed by the Community itself after the Treaty Act and long after the commencement of the Kenya Constitution containing provisions similar to the present s. 26.

Perhaps we should add that we are not required to determine whether s. 8 (1) of the Community's Official Secrets Act is necessary or desirable or even *intra vires*. Our function is one of deciding whether there is a conflict between that section and s. 26 of the Constitution and, if so, which of the two should prevail.

- (iii) The counsel for the Community has also drawn our attention to two decisions of the old Permanent Court of International Justice: *The Greco-Bulgarian Communities* P.C.I.J., Ser. B, No. 17, 32 and *German Interests in Polish Upper Silesia* (Merits) (M26) Series A, No. 7 (1 W.C.R., p. 510). We agree that both these cases concerned conflicts between international treaties and municipal laws and decided, on the basis of accepted principles of international law, that in such conflicts the treaties should prevail. We wish to make three short observations on this submission. No conflict between the Treaty for East African Co-operation and the Kenya Constitution or other Kenya law

has arisen. If we did have to decide a question involving a conflict between Kenya law on the one hand and principles or usages of international law on the other – this is how the counsel for the Community has put the matter to us – and we found it impossible to reconcile the two, we, as a municipal court, would be bound to say that Kenya law prevailed.

What we have just said applies with greater force if the Kenya law being considered is the Constitution of Kenya because if we allowed the treaty or the Treaty Act or the Official Secrets Act to prevail, we would in effect be allowing an amendment of the Constitution otherwise than in the manner laid down in s. 47. That cannot be done either by us or by any other tribunal.

We should also observe that, in our view, the principles governing the resolution of conflicts between treaties and the municipal law of one of the contracting parties do not apply to the resolution of conflicts between the same municipal law and a law enacted by a body set up by the treaty. The reason is this. A State signs a treaty in the full knowledge of its contents and in the full knowledge of its own laws and legal policy. An international tribunal would be doing the right thing by saying that a State must stand by its treaties. This cannot, however, be said of laws passed by a body established under the treaty. The contents of such laws (which might cover a very wide field) could not have been within the contemplation of the parties at the time of signing the treaty.

One last point remains to be considered. The Constitution of Kenya was amended in a great many respects by the Constitution of Kenya Act 1969. That Act specified in a Schedule the amendments made and included in another Schedule an edition of the Constitution with all amendments made from the commencement of the Constitution. This amending Act came into force on 18 April 1969. The Official Secrets Act of the Community under which the two prosecutions in question have been brought came into force on 28 February 1969. This means that the Community's Act preceded the Act of Parliament amending the Constitution and we have to consider the effect of sub-s. (3) of s. 10 of the Treaty Act which reads as follows:

- “(3). Where an Act of Parliament is inconsistent with an Act of the High Commission, an Act of Organisation or an Act of the Community enacted before it, it shall not be construed so as to repeal any part of the Act of the Organisation or Act of the Community, unless it makes express provision indicating the intention that it shall have effect notwithstanding the Act of the High Commission, Act of the Organization or Act of the Community.”

The Attorney-General's submission here is that this subsection refers to an inconsistency between an “Act of Parliament” and an Act of the Community and that, the expression “Act of Parliament” does not refer to the Constitution of Kenya but to the ordinary Acts passed by Parliament. The counsel to the Community, argues in answer to this submission, that Schedules to Acts are always regarded as parts of the Acts concerned; that, therefore, the present Constitution of Kenya should be regarded as an Act of the Kenya Parliament; and that because this Act of the Kenya Parliament is inconsistent with an Act of the Community which says that no prosecution shall be brought without the consent of the counsel to the Community, the Community's Act should prevail. While we agree that a Schedule to an Act is part of the Act, there is a difference between an ordinary Act and an Act amending the Constitution because the Constitution requires a specified majority for amendment. We do not believe Parliament intended the expression “Act of Parliament” in s. 10 of the Treaty Act to include an Act amending the Constitution. To accept this submission would mean that while Parliament itself could not pass an Act overriding the Constitution without observing the strict provisions of s. 47, it could authorise the E.A. Community to override it by its own Act. That is not a possibility to

be considered seriously. Even if we held that the expression “Act of Parliament” in s. 10 of the Treaty Act included the Constitution of Kenya Act, we would be bound to hold that that section was ultra vires in so far as it referred to the Kenya Constitution.

It is not inapposite here to state one or two facts which are liable to be lost sight of. The Kenya Constitution is the instrument which brought into being the entire state and government machinery that exists today. The legislature, the executive, and the judiciary owe their existence to the Constitution. Parliament has the power to make laws by a simple majority but it may not amend the Constitution unless the amending Act receives the percentage of votes specified in s. 47. Through the fundamental rights and freedoms which it guarantees to individuals the Constitution prescribes the basis for the economic and social institutions of the country. Its influence and its power are all-pervading.

If a constitutional lawyer were to write about Kenya in the same strain as Dicey did about England he would – to be accurate – have to emphasise the supremacy of the Constitution rather than of any one organ of Government. The Constitution and any Acts amending it must in the nature of things override all other laws. Lawyers will see the reason for this seemingly sweeping proposition in s. 47, although constitutional historians may be content with the historical facts that the Constitution lies at the root of our present-day political institutions and that it is effectively influencing the emergence of economic and social institutions suitable for a non-discriminatory democratic society in Kenya.

In fact, it is not necessary for the purposes of the present case to argue from first principles as we have tried to do in the last two paragraphs because s. 3 places beyond doubt the pre-eminence and the fundamental character of the Constitution as a law. That section reads:

- “3. This Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to s. 47 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.”

The Acts passed by the East African Community are, as already stated, given the force of law in Kenya. Therefore, s. 8 (1) of the Community’s Official Secrets Act is “other law” within the meaning of s. 3 of the Constitution and is invalid and of no effect in Kenya in so far as it makes the consent of the Community’s counsel necessary for prosecutions brought by the Attorney-General for offences contrary to the community’s laws.

We remit the two cases to the subordinate court to be disposed of in accordance with our decision.

Order accordingly.

For the first applicant:

H. P. Makecha (instructed by *Makhecha & Co.*, Nairobi)

For the second applicant:

S. Sangale (instructed by *Sangale & Co.*, Nairobi)

For the respondent:

K. D. Potter, Q.C. (Special Legal and Constitutional Counsel) and *T. A. Hayanga* (State Counsel)

From this decision the East African Community filed an Appeal.

East African Community v Republic
[1970] 1 EA 457 (CAN)

Division: Court of Appeal at Nairobi
Date of judgment: 25 February 1970
Case Number: 156/1969 (53/70)
Before: Sir Charles Newbold P, Duffus VP and Spry JA
Sourced by: LawAfrica

[1] Appeal – Jurisdiction – Constitutional reference in criminal case – No right of appeal to Court of Appeal – Criminal Procedure Code (Cap. 75), ss. 361, 379 (K.).

[2] *Constitutional Law – Attorney General’s functions – Conflict with E.A. Community legislation – Constitution, s. 26 (K.) – the Official Secrets Act, s. 8 (E.A.C.).*

[3] *Constitutional Law – Treaty – Does not become part of law until made so by law.*

[4] *Constitutional Law – Treaty – Made part of law – Void to extent of conflict with Constitution.*

[5] *Statute – Community laws – Not delegated legislation.*

Held –

- (i) no appeal lies on behalf of a party in a criminal case from a constitutional reference to the High Court;
 - (ii) the Community was not a party to the proceedings;
 - (iii) the appeal was incompetent;
- (Obiter)
- (iv) the Constitution is paramount and laws of the Community conflicting with it are void;
 - (v) treaties do not become part of the law of Kenya until made so by the law of Kenya;
 - (vi) having been made the law of Kenya, any such treaty which is in conflict with the Constitution is void;
 - (vii) it is incorrect to describe the legislation of the Community as delegated legislation.
- Appeal struck out.

No cases referred to in judgment.

Judgment

The considered judgment of the court was read by **Sir Charles Newbold P:** This appeal comes before us in the most unusual circumstances. It is an appeal by the East African Community (the Community) as appellant, with the Republic of Kenya as respondent, against a decision of the High Court of Kenya given on a reference to it by a resident magistrate of a question relating to the interpretation of the Constitution of Kenya.

Each of two persons was separately charged on separate charge sheets with an offence against the Official Secrets Act of the Community (the Community Act). Each of the charge sheets was signed by the Attorney-General of Kenya, thus making it clear that the proceedings were instituted by him. The offence charged in each case was one which under s. 8 of the Community Act could only be instituted with the written consent of the counsel to the Community. No such consent was produced. On each of the accused persons appearing before the resident magistrate the preliminary point was taken by the D.P.P. for the Republic that s. 8 of the Community Act was in conflict with s. 26 of the Constitution and, thus by reason of s. 3 of the Constitution, void. In each case the resident magistrate referred the question to the High Court under s. 67 of the Constitution and the two references were heard together and one judgment given covering both references. When the matter came before the High Court not only were the Republic and the two accused persons represented but the Community was also represented. It is not

clear how the Community came to be represented. While we consider that the High Court might very properly have asked the counsel to the Community to appear as *amicus curiae*, we are unaware of any provision whereby on a constitutional reference in a criminal case instituted by the Republic any person other than the accused persons and the

Republic can become a party to the proceedings. The High Court, having heard argument addressed to it on behalf of the Republic, the Community and the two accused persons, in a reserved judgment held that s. 8 of the Community Act was invalid and of no effect in Kenya in so far as it makes the consent of the counsel to the Community necessary for prosecutions brought by the Attorney-General. From that decision the Community appealed.

On the appeal coming before us, Mr. Potter, on behalf of the Republic, raised the preliminary objection that no appeal against the decision of the High Court lay to this court at this stage and also that the Community had no right of appeal in any event. Mr. Lutta objected to the preliminary objection on the ground that no notice of it had been given, but on our stating that we had proposed to raise these two matters ourselves as they related to jurisdiction, Mr. Lutta stated that he did not desire an adjournment and we heard argument on the preliminary objection and we also heard argument *de bene esse* on the appeal.

The question whether this appeal is competent raises two points: the first is whether a party to the proceedings on the constitutional reference could appeal against the decision on the reference and the second is whether the Community was a party to those proceedings, as obviously only a party to the proceedings could appeal against the decision on the proceedings.

As regards the first point, as the constitutional reference to the High Court arose from criminal proceedings in which the two accused were each charged with an offence, the hearing before the High Court was a criminal proceeding and the appeal before us was also a criminal proceeding. Mr. Lutta urged that there was nothing in the Constitution which prohibited this appeal and that, save where such a prohibition expressly occurs, a right of appeal lies to this court against a decision of the High Court given on a constitutional reference. It is true that there is nothing in the Constitution which prohibits an appeal but equally there is nothing in the Constitution which specifically grants a right of appeal directly from a decision of the High Court given on a constitutional reference. The appellate jurisdiction of this Court in Kenya is such as is given to us by the law of Kenya (see the Constitution, s. 64, and the Appellate Jurisdiction Act, s. 3). While we accept that the provisions conferring appellate jurisdiction on this court should not be construed in a restrictive manner but rather in the most liberal manner, nevertheless the court can only exercise appellate jurisdiction where that jurisdiction is given by the law of Kenya.

In criminal proceedings the only right of appeal from a decision of the High Court is that given in s. 361 and s. 379 of the Criminal Procedure Code. Section 361 deals with second appeals to this court from the appellate jurisdiction of the High Court. The decision of the High Court on a constitutional reference to it is a decision given in an original jurisdiction and not in an appellate jurisdiction. Nor can such a decision be said to be given in the exercise of revisionary jurisdiction and we consider that the reference in s. 361 (7) to a case stated must relate to ss. 368 to 378 which have been repealed. Thus this section, no matter how liberally construed, does not give appellate jurisdiction to this court directly from a decision of the High Court on a constitutional reference. Section 379 deals with appeals to this court from a conviction by the High Court of a person tried before it and also with a revisionary jurisdiction on the acquittal of any such person. Quite clearly this section does not apply as neither of the accused has been tried before the High Court.

Thus we are satisfied that this appeal is incompetent, as no party to the proceedings before the High Court on a constitutional reference to it in criminal proceedings can at that stage appeal to this court against the decision of the

High Court. We should like to make it clear, however, that the decision of the High Court can be the subject of review if an appeal is brought to this court under s. 361.

As regards the second point, Mr. Lutta submitted that the Community was obviously interested in proceedings in a court which called in question the validity of its legislation and he asked that this court give directions under r. 3 of the rules of this court so as to enable the Community to be a party to the proceedings. While we consider that this court could properly give directions which would enable the counsel to the Community to be heard as an *amicus curiae* on any appeal by any party to the proceedings, we do not consider that this court either could or should give directions which would result in the Community being made a party to criminal proceedings brought by the Republic against accused persons so as to enable it to become an appellant. As we have already pointed out, we do not know how the Community can be said to be a party to the criminal proceedings before the resident magistrate or to those proceedings on the constitutional reference to the High Court. This being so the Community could not in any event appeal to this court, as it is not a party to the proceedings in which the decision of the High Court was given and it is only a party to those proceedings which can appeal from that decision to this court. For this reason also the appeal is incompetent.

As we have come to the conclusion that the appeal is incompetent and should be struck out it is unnecessary to come to any conclusion on the merits of the appeal. However, as the arguments presented to us when we heard the appeal *de bene esse* raised certain matters of fundamental importance, we consider that it would be of general advantage if we expressed very shortly our views on some of those matters. First, it is quite clear that the Constitution of Kenya is paramount and any law, whether it be of Kenya, of the Community or of any other country which has been applied in Kenya, which is in conflict with the Constitution is void to the extent of the conflict. The courts are the guardian of the Constitution and their duty is in all circumstances to enforce its provisions as they are interpreted by the courts. Secondly, in one sense the Constitution is an Act of Parliament but it is a very special Act of Parliament. While the validity of any other Act of Parliament or law may be called in question in the courts, the validity of the Constitution, or any alteration thereof being made in accordance with the Constitution, cannot be questioned. Thirdly, the provisions of a treaty entered into by the Government of Kenya do not become part of the municipal law of Kenya save in so far as they are made such by the law of Kenya. If the provisions of any treaty, having been made part of the municipal law of Kenya, are in conflict with the Constitution, then to the extent of such conflict such provisions are void. Generally we agree with the decision of the High Court, though we consider it quite inappropriate and incorrect to describe the legislation of the Community as delegated legislation.

For the reasons we have set out we strike out this appeal as incompetent. We should like to express our appreciation to Mr. Lutta and to Mr. Potter for the help they have given us and the able, fair and lucid presentation of their arguments.

Appeal struck out.

For the appellant:

B. C. W. Lutta (Counsel to the Community) and *J. M. Khaminwa* and *T. T. M. Aswani* (Assistant Legal Secretaries)

For the respondent:

K. D. Potter, Q.C. (Special Legal and Constitutional Counsel) and *I. A. Hayanga* (State Counsel)

Anderia v Mowlem Construction Co Ltd
[1970] 1 EA 461 (HCU)

Division: High Court of Uganda at Kampala
Date of judgment: 16 March 1970
Case Number: 419/1969 (93/70)
Before: Jones J
Sourced by: LawAfrica

[1] *Damages – Personal Injuries – Quantum – Brain injury.*

[2] *Damages – Personal Injuries – Quantum – Shortening of leg.*

Editor's Summary

The High Court found that the defendant had injured the plaintiff by negligence, shortening his right leg, and causing brain injury which changed his personality. Shs. 60,000/00 was awarded in respect of the brain injury and Shs. 35,000/00 in respect of the shortening of the leg. The case is reported only on damages.

Cases referred to in judgment:

- (1) *Swan v. Taylor* (unreported).
- (2) *Meier v. Backer* (1961), Kemp & Kemp, *Damages in Personal Injury Cases*, Vol. 1, p. 243.
- (3) *Chambers v. British Railway Board* (1964), Kemp & Kemp *Op. cit.*, p. 236.
- (4) *Steele v. McGregor* (1964), Kemp & Kemp *op. cit.*, p. 240.
- (5) *Kitamirike v. Mutagubya*, [1965] E.A. 443.
- (6) *Agena v. East African Road Services C.C.* 388/68 (unreported).
- (7) *Nakalema v. Jaminder*, [1969] E.A. 155.

Judgment

Jones J: The claim was for general damages itemised as follows:

- (a) pain and suffering for cuts to head;
- (b) changed personality as a result of the head wounds;
- (c) abrasions to the neck, right elbow and head near the left eye;
- (d) compound comminuted fracture of the right tibia and fibula. It was claimed that there were three fractures of the tibia which broke into four major fragments. There was a lacerated wound overlying

the fracture 2 1/2 inches long and a fragment of the tibia protruding through the wound.

As to special damages amounting to Shs. 1,548/00 no evidence whatsoever was led to substantiate them. I therefore disallow them.

As to the general damages, we have the evidence of two doctors, two medical reports, the plaintiff himself, his friend and Canon Lubowyera, who works as a supervisor with the City Council, Kampala, for whom the plaintiff also works. Lubowyera seems to have been the plaintiff's supervisor.

Rwakoli who appears to have known the plaintiff well before the accident said of him:

"The plaintiff was a healthy man. He used to drink. He liked his social life.

After the accident he does not speak or converse very well. There is something on his head. He looks weak to me. I have seen him this morning but we have not spoken.

He keeps to himself. He was given a house. He lives alone. He does not drink now.”

Canon Lubowyera said that the plaintiff had been employed by the City Council for over 10 years as a road repairer, until he got the accident, at a salary of shs. 156/- per month. Since the accident he was found to be too weak to do his former job, so he was engaged as a sweeper at the same salary. Even now, he can only work for short periods and then goes away.

Lubowyera described his mental condition as:

“After the accident he does not seem to understand things properly. There is something wrong with his head. . . . He behaves like a child. He keeps aloof. He does not mix with his friends as he used to.”

That seems to tally with the evidence of Rwakoli.

From the plaintiff’s evidence it looks as if he is being cared for by the person from whom he rents his house. He said in evidence-in-chief:

“I was earning Shs. 150/- per month. I don’t know what I get now. I get my pay in an envelope. I give it to someone to keep for me. They are friends with whom I work. I don’t go out to buy stuff on my own. They buy stuff for me. The man who receives the money is the one from whom I rent the house.

I am not feeling alright when I stay under the sun I feel as if I were drunk. I feel dizzy.

I do not mix with anybody. I do not go out. I sleep most of the time. I was married. My wife left me. She went home when she saw I was not normal. I don’t know where she is. I am not interested in sexual life. I was normal before the accident. I have one child. My wife left me and took the child.

I feel very weak and I hate staying in the sun. I don’t feel like working. I feel strong. I work to get food. If I got damages I would go back to my country. I would not work as I don’t feel strong enough.”

Mr. Bailey a consultant neuro-surgeon at Mulago, who holds an M.B. degree and an F.R.C.S. of both England and Ireland examined the plaintiff on 24 July 1969. The latter complained:

- (1) that he could not walk;
- (2) that he could not sleep;
- (3) of dizziness when working under the sun in hot weather.

After examining the plaintiff he made a report, the gist of which was as follows:

Physically the only abnormality was the leg.

- (i) he had a scar over the front of the shin. There was a deformity which seemed to be the result of a fracture. His right leg was one inch shorter than the left.
- (ii) He did not detect any sign of injury to the head.

Mentally the surgeon did not consider that the plaintiff’s state was quite normal. He thought he was very dull. He could not tell Mr. Bailey what had happened to him and was disorientated in both time and place. He did not know the date or time, or anything about the Pope’s visit which was on at the time. The extent of his knowledge was that he knew that he was in Mulago.

Although he only saw him once, Mr. Bailey thought that he had received some damage to the brain as a result of his injury. He also thought that this

may very well be a permanent injury. He was unable to make certain by doing an electroencephalogram as the instrument was not functioning at the time.

He considered that the dizziness could be related to a head injury. He explained it was a common symptom and could disappear in time. The condition did not need special treatment.

He estimated his chances of getting epilepsy as 1 to 2 per cent.

His final word was:

“It is unlikely that as far as the other things are concerned that he would improve. When I came at 9.30 a.m. he was sitting in the corner. He has not moved. It is likely that there has been a change of personality.”

Mr. Bailey’s evidence was not challenged. There was no cross-examination.

Mr. Bewes, another specialist surgeon from Mulago gave evidence. He first saw the plaintiff about three days after his admission in October, 1968. He examined him again for the purpose of this case on 14 July 1969.

He found, on examining him, multiple linear scars on the right of the neck and right elbow. There was a scar about 1/3 inch above the left eye. There was another scar about 3 inches long running down the front of the right shin showing 7 scars which could have been caused by sutures. This overlay an ugly long lump in the region of the tibia which was consistent with a healing tibia which was 1/2 inch short. The plaintiff complained of pain in the lower left leg. Bewes found that he had good movement of the knee and ankle joint, but he was moving with a stiff and ungainly gait. There was some wasting of the muscle of the calf of the leg. The stiff gait and muscular wasting was consistent with the compound comminuted fracture of the right tibia and fibula.

The plaintiff also complained to Mr. Bewes that he had been unable to get work with the Council because he was dizzy when working in hot sunshine. Mr. Bewes explained that he was not a Neuro-surgeon but from the symptoms it was conceivable that the plaintiff had received slight brain damage.

On the question of brain damage, I accept the evidence of Mr. Bailey, the Neuro-surgeon, that he had received some damage to the brain and that it was unlikely that he would improve. I also find from all the evidence before me, including that of Mr. Bailey, that the plaintiff had suffered a change in personality.

There are two items therefore on which the plaintiff is entitled to damages (1) the injury to the leg resulting in the shortening of the leg and the continuing pain; (2) the brain injury and the resultant change in personality.

On the first point the chances of arterio arthritis are remote but his gait is ungainly and there is an ugly lump on the leg.

In Uganda the compensation given for shortening of the leg has varied from Shs. 50,000/- in *Kitamirike v. Mutagubya*, [1965] E.A. 443 where the leg was shortened 1 inch to Shs. 35,000/- in *Nakalema v. Jaminder & Others*. [1969] E.A. 155 where Sheridan, J., gave Shs. 35,000/- again where the leg was shortened 1 1/4 inches.

In the *Kitamirike* case there was some complication in the hip as well but the then Chief Justice Sir Udo Udoma described the award of Shs. 50,000/- which he gave as a modest sum. He may have been influenced in describing it as a modest sum by the fact that Kitamirike was at the time in the

Attorney-General's Office of the then Kabaka's Government. In that case also there was a prospect of osteo-arthritis and a further operation.

Sheridan, J.'s award was based on the prognosis of Sir J. Croat which he described as more cheerful than the prognosis in the Kitamirike case.

In the last case cited to me, *John Akena v. East African Road Services* Civil Case 388 of 1968, Youds, J., gave Shs. 35,000/- to a boy of 12 where a leg had been shortened 3/4 inch.

After due consideration I think that in this case a sum of Shs. 35,000/- to be an equitable sum to award for his leg injury.

I now turn to the question of compensation for the brain injury and the change in personality. The injury to the brain is slight but the plaintiff seems to have been reduced to a moron. He has also lost the comfort of his wife, who has left him because of his condition and I suspect because he has lost all desire for sexual intercourse.

He is 40, and in a lowly occupation, but he has received an injury to his brain, which has disrupted his marital life and rendered him indifferent to some of the pleasures of life. He is living a "cabbage existence" to use a colloquial phrase and there is little likelihood of his ever improving. Damages for injuries of this kind range from £4,000 *Swan v. Taylor* to *Chambers v. British Railway Board* (1964), Kemp & Kemp, Vol. I, p. 236 £11,000, £7,000 in *Steele v. McGregor* (1964), Kemp & Kemp, Vol. I, p. 241, and £6,000 in *Meier v. Backer* (1961), Kemp & Kemp, Vol. I, p. 243.

I was referred to one of my own cases in Uganda, where I gave Shs. 80,000/- to a schoolmaster in Jinja whose personality had changed as a result of a motor accident.

I am conscious of the fact that whatever I give by way of compensation, it cannot be a scientific calculation of the loss in amenities which this hapless man is likely to suffer. I observed the plaintiff in the witness box. He was anything but a normal person. From the evidence he does not seem able to look after himself adequately at the moment.

After a great deal of heart searching I have arrived at the figure of Shs. 60,000/- as compensation for the brain injury and change in personality.

I give judgment therefore for the plaintiff for Shs. 95,000 plus costs.

For the plaintiff:

S. H. Dalal (instructed by *Dalal & Singh*, Kampala)

For the defendant:

O. J. Keeble (instructed by *Hunter & Greig*, Kampala)

Kafero v Standard Bank Ltd [1970] 1 EA 465 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	23 February 1970
Case Number:	86/1969 (94/70)
Before:	Youds J
Sourced by:	LawAfrica

[1] *Civil Practice and Procedure – Setting aside – Ex parte judgment – No notice of hearing to defendant on record – Judgment to be set aside – Civil Procedure Rules, O. 9 rr. 8A, 9, 10, 24 (U.).*

Editor's Summary

On the expiry of the extended period given to him for filing a defence the appellant's advocate asked for particulars of the claim and for a further extension until after receipt of the particulars. Instead of replying the advocate for the respondent set the case down for hearing without notice to the appellant and obtained an ex parte judgment.

The appellant applied to have the judgment set aside and when this was refused appealed.

Held –

- (i) where appearance has been entered a defendant is entitled to notice of setting down of the suit for hearing even when a defence has not been filed.
- (ii) the appellant was prevented by sufficient cause from attending at the hearing.

Appeal allowed.

Cases referred to in judgment:

- (1) *Otanga v. Nabunjo* (Civil Case 613 of 1963, unreported).
- (2) *Barclays Bank D.C.O. v. Kangane and Kiini* (Civil Case 182 of 1967, unreported).

Judgment

Youds J: This is an appeal against an order made by His Worship M. C. Kantinti, Chief Magistrate of the Mengo magisterial area, at Mengo on 24 February 1968, whereby he dismissed an application made by the appellant to set aside an ex parte judgment and decree obtained against him by the Standard Bank Ltd. on 21 October 1966 in the chief magistrate's court of the Mengo magisterial area.

The suit was originally brought by the Standard Bank Ltd. against the appellant by plaint filed in the Mengo magistrate's court on 4 August 1966 claiming payment by the appellant of the amount of money by which his current account with the bank was overdrawn and also claiming certain additional relief and costs. Appearance was duly entered to the suit by Mr. S. V. Pandit, on behalf of the appellant on 26 August 1966, and it is not in dispute that Mr. Pandit also sought and obtained the consent of the advocates acting on behalf of the bank to deliver a defence to the suit by 12 September 1966. Then on that date, instead of filing a written statement of defence, Mr. Pandit wrote a letter to the bank's advocates asking for certain further and better particulars of the bank's claim and requesting a further extension of time for delivery of his defence until 15 days after the bank's advocates had supplied the particulars. There is no doubt that that letter requesting particulars and a further extension of time was received by the bank's advocates because its receipt was acknowledged in para. 8

of an affidavit sworn to on 25 November 1966 by a Mr. Lad, an assistant accountant with the plaintiff Bank. Instead of having the courtesy and good manners to reply to Mr. Pandit's letter and either grant or refuse his request, the Bank's advocates chose to ignore his letter completely and I censure the bank's advocates for behaving in such a discourteous and unprofessional manner as not only to ignore a letter written by a fellow advocate, but also for their subsequent conduct which was to set down the bank's suit for hearing *ex parte* under O. 9 r. 8A (2) of the Civil Procedure Rules without even giving either Mr. Pandit or the appellant notice of what they were doing.

But quite apart from the bank's advocates acting in a discourteous, sharp and unprofessional manner, I am satisfied that they acted in contravention of O. 9 r. 10 of the Civil Procedure Rules, which rule reads as follows:

"Where a defendant has entered an appearance under Rule 1 hereof, the Plaintiff may set down the suit for hearing in court, with notice to the opposite party, after the expiration of the time allowed to a defendant for filing a defence, or the last of the defences."

It was conceded by Mr. Sengooba who appears for the respondent, that no notice was given to Mr. Pandit or to the appellant that the suit was being set down for hearing in court, nor were either of the two hearing dates notified to Mr. Pandit or to the appellant when the suit came first before Mr. Ssebuggwawo, a grade I magistrate on 11 October 1966, and then when apparently it was discovered that that magistrate had acted in excess of his jurisdiction the suit was re-heard before Mr. Paul Sebalu, a chief magistrate, on 21 October 1966 and he gave an *ex parte* judgment in favour of the appellant and awarded costs and other ancillary relief.

I am indeed surprised that neither of these two trial magistrates ever enquired from the bank's advocates whether notice of the setting down of the suit and of the hearing dates had been given to the appellant's advocate or to the appellant, because his entry of appearance must have been on the court file and they ought either to have known of the existence of O. 9 r. 10 of the Civil Procedure Rules or have realised that, in the interests of natural justice, a judgment should not be given against a defendant who had entered an appearance to a suit and had thereafter not been notified of the hearing date of the suit or given any opportunity of putting forward his defence to the suit. "Back-door" justice, as it is sometimes called, is not true justice and is to be deprecated.

As a result of the bank's advocates appearing before the chief magistrate of the Mengo magisterial area, on 21 October 1966, the bank obtained a snap *ex parte* judgment against the appellant quite improperly, because O. 9 r. 10 of the Civil Procedure Rules had not been complied with by the Bank or its advocates as a preliminary to obtaining that snap judgment. Mr. Sengooba now seeks to excuse the conduct of the Bank's advocates by arguing that they complied with O. 9 r. 8A (2) when seeking an *ex parte* judgment, and that r. 8A (2) is inconsistent and irreconcilable with r. 10. I find this argument completely fallacious because *all* rules of the court must be complied with and it is not open for a litigant or advocate to pick out one rule which suits his case and comply with that rule, whilst at the same time completely disregarding another rule. When there is any inconsistency between two rules, then both have to be observed, but in the present instance there was plenty of authority laid down in decided cases for the guidance of the bank's advocates if they had had the slightest difficulty in understanding the import and meaning of the two court rules in question. In a judgment given by Russell, J. tried in this High Court – *Otanga v. Nabunjo* (Civil Case 613 of 1963) it was then clearly laid down that O. 9 r. 10 had not been revoked or done away with when the new r. 8A was passed, and a judgment to similar effect was given by Phadke, Ag. J. in

Barclays Bank D.C.O. v. Kangave and Kiini (Civil Case 182 of 1967) wherein it was clearly laid down that a defendant who had entered an appearance to a suit, was entitled as of right under O. 9 r. 10 to receive notice of the hearing date of the suit even though he had not filed a written statement of defence.

The snap ex parte judgment and decree were obtained by the bank from the chief magistrate of the Mengo magisterial area on 21 October 1966, and thereafter the reaction of Mr. Pandit, the appellant's advocate, was immediate and proper as soon as he learnt that such ex parte judgment and decree had been obtained against the appellant without his knowledge and in his absence. Mr. Pandit immediately made application by notice of motion dated 26 October 1966 to the same chief magistrate's court to set aside the ex parte judgment and decree and he based his application (1) under O. 9 r. 24 or, alternatively (2) under O. 9 r. 9 or alternatively (3) under the inherent powers of the court under s. 101 of the Civil Procedure Ordinance 1929.

For some reason which was never explained to me in the course of hearing this appeal, the notice of motion to set aside the ex parte judgment and decree, although filed on 26 October 1966, was not heard until the 18 January 1968 by the then chief magistrate for the Mengo magisterial area, His Worship M. C. Kantinti, and I also observe from the magistrate's court file that although the application to set aside the ex parte judgment and decree was already pending, certain moves were nevertheless made by the bank's advocates to obtain execution of the judgment and decree. Again I censure the bank's advocates for behaving in such a reprehensible manner as to seek to enforce a judgment and decree when they knew full well that there was a motion already before the same court to have that same judgment and decree set aside, and I also censure the magistrate's court and its chief magistrate for entertaining such an application to execute a judgment or decree when there was already a motion before his Court to set aside that same judgment and decree.

When on 18 January 1968, His Worship M. C. Kantinti did eventually hear the appellant's application to set aside the ex parte judgment and decree, he reserved his ruling until 24 February 1968 and then he dismissed the application with costs. It is against this chief magistrate's ruling that the appellant is now appealing before me in the High Court.

In his ruling which he has put into writing, the chief magistrate appears only to have considered the application under O. 9 r. 24 of the Civil Procedure Rules, but of course this was the rule under which the application was primarily brought by the appellant and which is the more appropriate rule to consider, the application being one to set aside an ex parte decree. However, although dealing with the application solely as an application under O. 9 r. 24, the chief magistrate does not appear to have applied his mind at all to what r. 24 states, which is that if a defendant satisfies the Court . . . "that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court, or otherwise as it thinks fit . . .".

Had the chief magistrate applied his mind to r. 24 and to the admitted facts that the appellant was never given notice of the hearing date of the suit and that the reason he was not given notice was the fault of the bank or its advocates who had failed to comply with O. 9 r. 10 of the Civil Procedure Rules, then the chief magistrate must have found that the appellant had shown sufficient cause for his non-appearance in that he had shown that he had been prevented from appearing when the suit was called on for hearing because of the neglect and failure of the bank or its advocates to give him notice of the date of hearing as they were under a duty to do. Having found this as he ought to have done, the chief magistrate ought again to have considered r. 24 which states that the

defendant having shown sufficient cause, the court *shall* (not may) make an order setting aside the decree upon such terms as it thinks fit.

In my judgment, the chief magistrate went completely wrong when considering and deciding this application made on behalf of the appellant, and he completely failed to apply his mind to what r. 24 states and whether good cause had been shown by the appellant for his non-appearance at the hearing of the suit. Apparently he had some idea that the application before him should be considered and tried “on its merits” (whatever that may mean), when all he had to decide under r. 24 was whether or not the appellant had shown sufficient cause for his non-appearance at the hearing of the suit.

In addition to allowing this appeal and setting aside the ex parte judgment and decree obtained by the respondent on 21 October 1966 under the powers conferred on the Court by O. 9 r. 24, I also allow this appeal and set aside the judgment and decree under the powers conferred on the Court by O. 9 r. 9 because it would be quite wrong and unjust to allow the respondent to retain and make use of a judgment which the bank had obtained improperly and without complying with court rules of procedure before and at the time it was obtained.

The appeal is therefore allowed with costs to the appellant of this appeal and also of his costs in the Magistrates Court below occasioned by and in connection with the making of his application to set aside the judgment. The judgment and decree made in the magistrates court on 21 October 1966 are set aside, and I further order and direct in accordance with O. 9 r. 24 that the suit shall henceforth proceed as follows:

The bank’s advocates do within 14 days reply to the letter of 12 September 1966 written to them by Mr. Pandit, the appellant’s advocate, and furnish the particulars of the bank’s claim sought in that letter: that the appellant’s time for delivery of his written statement of defence be extended and remain open until 15 days after the requested particulars have been supplied by the bank’s advocates: that the plaintiff do have 14 days thereafter to make reply to the defence if considered necessary; and that thereafter pleadings are to be considered closed and the parties are then at liberty to apply to the court for a date to be fixed for the hearing of the suit.

Appeal allowed.

For the appellant:

S. V. Pandit

For the respondent:

A. M. Manek

Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd (No 2)
[1970] 1 EA 469 (CAN)

Division: Court of Appeal at Nairobi

Date of judgment: 28 May 1970

Case Number: 37/1969 (98/70)

Before: Duffus P, Spry VP and Lutta JA
Sourced by: LawAfrica
Appeal from: The High Court of Kenya – Farrell, J

[1] *Contract – Uncertainty – Terms to be clear and certain – Effect of contract being executed or partly executed.*

[2] *Contract – Uncertainty – Reasonable terms to be implied where parties intended to enter into legal arrangements.*

[3] *Damages – Interest – Award assessed by court – Interest only from date of judgment.*

Editor’s Summary

The appellant, a company manufacturing biscuits entered into a contract with the respondent whereby it was to be the sole distributor for the appellant’s biscuits for a period of three years. The respondent was not to take part in actual selling but was to be responsible for sales promotion and was to receive a commission. On the termination of the agreement by the appellant the respondent sued for damages and an account. The High Court found there was a contract and awarded general damages with interest from the date the contract would have expired. The appellant appealed, alleging that the contract was too vague to be enforceable, that the respondent had not proved that it had suffered damage and had not mitigated any loss suffered and that the judge erred in awarding interest for a period prior to judgment.

Held –

- (i) in general the terms of a contract must be clear and certain;
- (ii) a contract is less likely to be found void for uncertainty if executed or partly executed (*British Bank for Foreign Trade Ltd. v. Novinex Ltd.* (7) and *F. & G. Sykes (Wessex) Ltd. v. Fine Fare Ltd.* (14) followed);
- (iii) as reasonable terms will be implied in respect of remuneration and termination and for the carrying out the intention of the parties, the test of reasonableness will be invoked to cure uncertainty in other respects where the parties intended to enter into an agreement legally binding on them;
- (iv) the evidence in support of the damages claimed was unsatisfactory and the damages would be reduced;
- (v) no evidence was given by the appellant that there were any other agencies available;
- (vi) while the judge had power to award interest from a date prior to judgment, where damages have to be assessed by the court, interest should only be given from the date of judgment. (*Prem Lata v. Mbiyu* (12) followed).

Observations on the effect of failure to prosecute a suit diligently on the award of interest.

Appeal allowed in part.

Cases referred to in judgment:

- (1) *Abrahams v. Herbert Reisch Ltd.*, [1922] 1 K.B. 477.
- (2) *Rose and Frank Co. v. J. R. Crompton & Bros. Ltd.*, [1923] 2 K.B. 261.
- (3) *Hillas and Co. Ltd. v. Arcos Ltd.* (1932), 147 L.T. 503.

- (4) *May and Butcher Ltd. v. The King*, [1934] 2 K.B. 17.
- (5) *Way v. Latilla*, [1937] 3 All E.R. 759.
- (6) *G. Scammell and Nephew Ltd. v. Ouston*, [1941] A.C. 251.
- (7) *British Bank for Foreign Trade Ltd. v. Novinex Ltd.*, [1949] 1 K.B. 623.
- (8) *Powell v. Braun*, [1954] 1 All E.R. 484.
- (9) *Southern Highlands Tobacco Union Ltd. v. McQueen*, [1960] E.A. 490.
- (10) *Re Day's Will Trusts*, [1962] 1 W.L.R. 1419.
- (11) *Australian Blue Metal Ltd. v. Hughes*, [1963] A.C. 74.
- (12) *Prem Lata v. Mbiyu*, [1965] E.A. 592.
- (13) *Lavarack v. Woods of Colchester Ltd.*, [1966] 3 All E.R. 683.
- (14) *F. & G. Sykes (Wessex) Ltd. v. Fine Fare Ltd.*, [1967] 1 Lloyd's Rep. 53.
- (15) *Kawoko Estate Coffee Factory Ltd. v. Zassa* C.A. 32 of 1969 (unreported).

The following considered judgments were read:

Judgment

Spry VP: This is an appeal from a judgment and decree of the High Court in a suit for an account and for damages for breach of contract.

The appellant company (to which for convenience I shall refer as Mukisa) is a company incorporated in Uganda, whose business is the manufacture for sale of biscuits. The respondent company (to which I shall refer as West End) is a Kenya company which acts as a selling agent and sales promoter.

West End alleged in its plaint that it entered into a verbal agreement with Mukisa on or about 13 April 1961, under which, after an interim period, West End was to become the sole distributor in Nairobi of Mukisa's biscuits. During the interim, West End was to work in conjunction with the then existing distributors, a firm called Popatlal Jivraj. According to the plaint, this agreement was varied on or about 10 May 1961, by a further verbal agreement (it would perhaps have been more accurate to describe the transaction as the substitution of a new agreement). Under this alleged agreement, which was to subsist for three years, West End was to be responsible for sales promotion, but not to have any part in the actual sale and distribution of the biscuits and was to be remunerated by a commission at the rate of 1 1/2 per cent on all sales effected through Popatlal Jivraj. The arrangement between the parties was determined summarily by Mukisa on 13 July 1961. West End thereupon claimed an account in respect of the short period during which the second agreement had been in force and damages in respect of the commission to which it would there-after have become entitled. The case for Mukisa was that although there were protracted negotiations and, indeed, certain working arrangements, no enforceable contract came into being.

Although the suit was filed on 22 August 1961, it did not come on for trial until 27 February 1968, and judgment was eventually given on 12 May 1969. These delays, for which the advocates on both sides must take the blame, are among the many unsatisfactory features of these proceedings. At the first

hearing of the suit, by way of preliminary objection, the court was invited, but refused, to dismiss it for want of prosecution. This objection was subsequently repeated, and there were requests for a stay of the proceedings pending appeal. When, after the case for West End had been closed, the last of these requests was made and refused, Mr. Wilkinson, for Mukisa, said that he was appearing under protest and would call no evidence. He did, however, address the court.

Only one witness was called for West End, the managing director, a Mr. A. J. Lakhani, whom the trial judge accepted as a witness of truth. On the basis of

his evidence, the judge found that there had been a contract and that it had been broken by Mukisa. He ordered an account, as prayed, in respect of the period prior to the determination of the contract, awarded a sum of Shs. 349/13, which was not contested, as special damages, and a sum of Shs. 42,500/- as general damages for the breach of contract, with interest as from the date when the contract would have expired.

Against that decision, Mukisa has appealed, first against the finding that there was a contract, secondly, against the assessment of damages and, thirdly, against the award of interest.

On the first ground, Mr. Wilkinson, relying particularly on *May and Butcher Ltd. v. The King*, [1934] 2 K.B. 17; *G. Scammell and Nephew Ltd. v. Ouston*, [1941] A.C. 251 and *In re Day's Will Trusts* [1962] 1 W.L.R. 1419, based his main argument on the proposition that for an agreement to be enforceable as a contract, its terms must be clear and certain. The contract alleged by West End was for a fixed term of three years; that was clear enough. The obligation on the part of Mukisa was to pay a commission at a fixed rate on the sales effected by Popatlal Jivraj. That was an obligation which was specific and clearly enforceable. The obligation on the part of West End, however, according to the plaint was as follows:

- “(b) The plaintiff was to be responsible for the marketing, advertising and all other methods of sale promotion of the defendant's said products, but actual sale and distribution were to be effected by the said Messrs. Popatlal Jivraj.
- (c) The plaintiff was to ensure the maintenance of efficient selling and delivery system by the said Messrs. Popatlal Jivraj.”

Mr. Wilkinson argued that these provisions were too vague to support a contract. He based his argument entirely on this proposition and not on lack of consideration. He submitted that on such vague obligations it would never be open to Mukisa to say “You have not done this or that and therefore you are in breach of our agreement.”

In support of this argument, Mr. Wilkinson referred to the evidence by Mr. Lakhani. In examination in chief he had said:

“We were to be responsible for seeing that the right type of advertisement was being put out by the advertising agency. We were to provide Popatlal with route chart of salesman's working. We were to see that proper service was being maintained. We were in short responsible for marketing and sales promotion.”

In cross-examination, he said:

“There was no condition that we must co-operate with Popatlal Jivraj. Officially, I had no connection with Popatlal Jivraj.”

Later, when it was put to him that, in return for his commission, he had to do some specific acts, he replied with a simple “No”. Other relevant parts of the cross-examination were somewhat ambiguous.

Mr. Gautama, for West End, argued that in recent years new techniques of marketing and business management have sprung up and that a person engaging the services of an expert in these techniques necessarily gives him a free hand. Since the employer engages the expert to discover what should be done, the contract could not possibly particularise it.

I have found this a particularly difficult question. There can be no doubt that as a general proposition, Mr. Wilkinson is correct in saying that for an agreement to amount to a contract, its terms must be clear and certain. That

principle has, however, been qualified by the courts in several respects. In the first place, the courts are disinclined to hold a contract void for uncertainty if it has been wholly or even partly executed, where they would show less reluctance if it were still executory. In *British Bank for Foreign Trade Ltd. v. Novinex Ltd.*, [1949] 1 K.B. 623, Cohen, L.J., quoted with approval the following words of the trial judge:

“The principle to be deduced from the cases is that if there is an essential term which has yet to be agreed and there is no express or implied provision for its solution, the result in point of law is that there is no binding contract. In seeing whether there is an implied provision for its solution, however, there is a difference between an arrangement which is wholly executory on both sides, and one which has been executed on one side or the other.”

And in *F. & G. Sykes (Wessex) Ltd. v. Fine Fare Ltd.*, [1967] 1 Lloyd’s Rep. 53, Lord Denning, M.R., said:

“In a commercial agreement the further the parties have gone on with their contract, the more ready are the Courts to imply any reasonable term so as to give effect to their intentions. When much has been done, the Courts will do their best not to destroy the bargain. When nothing has been done, it is easier to say there is no agreement between the parties because the essential terms have not been agreed.”

In the present case, the second agreement had partly been performed by West End during the two months before its determination: I doubt if as much had been done as Mr. Gautama suggested, but the arrangement was certainly not wholly executory.

Secondly, where the parties have omitted to provide for the determination of an agreement, the courts will, in the appropriate case, imply a provision for the giving of reasonable notice (see, for example, *Australian Blue Metal Ltd. v. Hughes*, [1963] A.C. 74). That does not arise here, as the agreement was for a term certain.

Thirdly, where the agreement is silent or indefinite as to remuneration, the courts will, if possible, remedy the deficiency either by implying a term promising reasonable remuneration or by awarding a quantum meruit. (See, for example, *Way v. Latilla*, [1937] 3 All E.R. 759 and *Powell v. Braun*, [1954] 1 All E.R. 484).

Fourthly, the courts will imply terms providing the machinery to carry out the intention of the parties. In *Hillas and Co. Ltd. v. Arcos Ltd.* (1932), 147 L.T. 503, at p. 514, Lord Wright said:

“That maxim, however, does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as for instance, the implication of what is just and reasonable to be ascertained by the court as matter of machinery where the contractual intention is clear but the contract is silent on some detail. Thus in contracts for future performance over a period, the parties may neither be able nor desire to specify many matters of detail, but leave them to be adjusted in the working out of the contract. Save for the legal implication I have mentioned, such contracts might well be incomplete or uncertain; with that implication in reserve they are neither incomplete nor uncertain.”

By parity of reasoning, there would seem no reason why, in an appropriate case, the test of reasonableness should not be invoked to cure uncertainty in other respects, provided, of course, that it is clear that the parties intended to enter into an agreement legally binding on them. In matters of business, it is

normally assumed that the parties intend legal consequences to follow from their arrangements (*per* Bankes, L.J., in *Rose and Frank Co. v. J. R. Crompton and Bros. Ltd.*, [1923] 2 K.B. 261 at p. 282). In the present case, I have no doubt that if, as the trial judge found, the parties reached agreement, they intended it to be legally enforceable.

I have only been able to find one case (none was cited to us) where the test of reasonableness has been applied, otherwise than in relation to the matters I have mentioned: that is the case of *Abrahams v. Herbert Reich Ltd.*, [1922] 1 K.B. 477. That was a case where a firm of publishers had agreed to publish a series of articles in a magazine and later as a book, on which the authors were to receive 4d. a copy. Nothing was said in the contract regarding the form or price of the book, the number of copies to be printed or the date of publication. In the event, the publishers refused to publish the book and the authors sought to recover damages. It does not seem to have been disputed, certainly not in the Court of Appeal, that a contract had been broken, even though it was, in the words of Scrutton, L.J., “so vague and general in its terms that it is hard to say what it means”. In assessing damages, the court, though not entirely unanimous, appear to have worked on the basis of what would have been a reasonable measure of performance.

I think the same test could have been applied in this case, if the breach had been on the part of West End. Obviously there could not have been an action for specific performance but that does not mean that there was no contract, since specific performance is not available in respect of contracts for personal services. I see no reason why an action should not have been brought for damages, if West End had done nothing, or less than a reasonable minimum, in performance of its part of the contract.

Mr. Wilkinson also submitted that the agreement was unenforceable because Popatlal Jivraj was not a party to it, and he argued that West End’s rights could at any time have been defeated if Mukisa had ceased to make biscuits or to supply them to Popatlal Jivraj, or if Popatlal Jivraj had ceased to do business or had refused to deal with business introduced by West End. With respect, I think that these considerations are irrelevant. The fact that the object of an agreement may be defeated by extraneous happenings and even by the action of one party is not a reason for holding that the contract is ineffectual, when those happenings have not occurred or that action has not been taken. As Diplock, L.J., said in *Lavarack v. Woods of Colchester Ltd.*, [1966] 3 All E.R. 683, at p. 691:

“The events extraneous to the contract, on the occurrence of which the legal obligations of a defendant to a plaintiff thereunder are dependant, may include events which are within the control of the defendant: for instance, his continuing to carry on business, even though he has not assumed by his contract a direct legal obligation to the plaintiff to do so. Where this is so, one must not assume that he will cut off his nose to spite his face and so control those events as to reduce his legal obligations to the plaintiff by incurring greater loss in other respects. That would not be the mode of performing the contract which is ‘the least burthensome to the defendant’.”

For these reasons, I think the arrangement, although unsatisfactory and possibly one-sided, did amount to a contract and I would reject the first ground of appeal.

Mr. Wilkinson’s second submission was that it was for West End to prove the damage it had suffered, that it had failed to do so and therefore that it was not entitled to recover anything. As I have said, under the contract West End was to receive 1 1/2 per cent commission on all sales effected by Popatlal Jivraj.

No attempt was made to prove the actual amount of those sales. In the plaintiff, West End claimed damages on loss of commission estimated at Shs. 1,500 a month, that is, on sales amounting to £5,000 a month. The only evidence on the subject was that of Mr. Lakhani. He said that at the time of the first agreement, sales through Popatlal Jivraj were about £1,000 per month and that by the time the second agreement was determined, they were about £3,000 a month and increasing. He made an obscure reference to sales increasing to about 5/4ths in August. In cross-examination, he said:

“During June and July I obtained a rough idea from the salesmen of the amount of the sales by Popatlal Jivraj. The figure of £5,000 mentioned in paragraph 8 of the plaintiff is based on performance, and is not a wild guess.”

Mr. Wilkinson commented, with every justification, on the fact that West End made no attempt to obtain the actual figures by interrogatories or discovery, nor was Popatlal Jivraj called to give evidence as to his sales. I do not think this failure deprives West End of its right to damages, but if a party fails to take all reasonable steps to prove the damages it has suffered, it cannot complain if the award is less than it might have been. It is true, as the judge said, that Mukisa could have called evidence which would have left the matter in no doubt, but the onus was on West End.

In the circumstances, I think the judge was wrong to accept the figure £5,000. Mr. Lakhani was probably in a position to know approximately what were the sales of biscuits while the agreement subsisted, but he has not shown how he could have had any knowledge of them after its determination. According to his own evidence, there was never any co-operation between Popatlal Jivraj and himself and it is only reasonable to suppose that his relations with Mukisa were unfriendly. Also, I do not think it can be assumed that sales would have increased. The discord between the parties suggests that all was not going well, and there is evidence on the record that suggests that some of the biscuits delivered were unsatisfactory in quality. In my opinion, the judge was not entitled to adopt any figure over £3,000 per month as the basis for the assessment of damages.

Mr. Wilkinson also made certain minor submissions on the quantum of damages. First, he submitted that allowance should have been made for income tax. He did not develop this argument, and having regard to what was said on the subject in *Southern Highlands Tobacco Union Ltd. v. McQueen*, [1960] E.A. 490, I am not satisfied that there is any merit in the argument. Secondly, he submitted that a deduction should have been made for the expense of running a van, which Mr. Lakhani had put at Shs. 1,500 a month. As I understand the evidence, however, this van only operated under the first agreement. Thirdly, he referred to Mr. Lakhani having said that he expected to incur a loss for the first six months, but I am satisfied that this also related to the first agreement, under which West End, as a distributor, would have had to acquire and hold stocks of biscuits. Under the second agreement, West End does not appear to have been required to lay out any substantial sums of money. Finally, and more important, Mr. Wilkinson argued that West End had failed to mitigate its loss. On this subject, Mr. Lakhani said “I have not looked for another commission agency to take the place of the agency I lost. We did not think it worthwhile in the light of experience.” Later, he said “Agencies are not easily picked up.” There was a duty on West End to mitigate the damage and Mr. Lakhani’s evidence on this subject is far from satisfactory. The onus of proving that other agencies were available was, however, on Mukisa (see *Southern Highlands Tobacco Union Ltd. v. McQueen*, supra, and no attempt was made to discharge it. I think, therefore, that there is no merit in any of these points.

Mr. Wilkinson's third ground of appeal (a supplementary ground argued with leave) was that the judge erred in allowing interest on the damages awarded as from 15 August 1964, that being the date when the second agreement would have expired, had it not been determined. I think it is clear that the judge had power to make that award, but with respect I do not think he should have done so. The principle appears clearly, I think, in the judgment of this court in *Prem Lata v. Mbiyu*, [1965] E.A. 592. That was a case concerning damages for personal injuries. The principle that emerges is that where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interest from the date of filing suit. Where, however, damages have to be assessed by the court, the right to those damages does not arise until they are assessed and therefore interest is only given from the date of judgment. In the present case, West End did not prove that any specific sum was due as damages: the court had to make the best assessment it could on inadequate material. In these circumstances, I think that interest should only have been awarded on the general damages as from the date of judgment. I would remark in passing that in *Kawoko Estate Coffee Factory Ltd. v. Zassa* (Civil Appeal 32 of 1969, unreported), this court held that undue delay in bringing an action may be a good reason for refusing interest on money wrongly withheld. I think that failure to prosecute a suit with diligence might well have the same result.

To sum up, I would allow this appeal to this extent: I would reduce the award of general damages from Shs. 42,500 to Shs. 22,100 and I would order that interest on that sum should run from the date of judgment, not from 15 August 1964. I would leave undisturbed the order for an account, although the parties would, of course, be at liberty to settle this on the lines indicated by the judge, as modified by the decision of this court. I would also leave undisturbed the award of Shs. 349/13 as special damages and the interest thereon as awarded from 15 August 1964. I would also leave undisturbed the order for costs in the High Court. I would award Mukisa one half of its costs of the appeal, with a certificate for two advocates.

Duffus P: I have read and agree with the judgment of the Vice-President and there will be an order in the terms proposed by him.

Lutta JA: I also agree.

Appeal allowed in part.

For the appellant:

P. J. Wilkinson, Q.C. and D. N. Khanna (instructed by *Khanna and Co.*, Nairobi)

For the respondent:

S. C. Gautama and A. B. Shah

Odd Jobs v Mubia
[1970] 1 EA 476 (CAN)

Division: Court of Appeal at Nairobi

Date of judgment: 28 May 1970

Case Number: 49/1969 (100/70)

Before: Duffus P, Law and Lutta JJA
Sourced by: LawAfrica
Appeal from: The High Court of Kenya – Dalton, J.

[1] Civil Practice and Procedure – Pleading – Unpleaded issue – Court may decide unpleaded issue if left to it for decision.

[2] Civil Practice and Procedure – Issues – Duty on court and advocates to ensure that issues are framed.

Editor’s Summary

The respondent sued the appellant in the High Court for money had and received being the proposed purchase price of a motor car in respect of which no completed contract had been entered into. No issues were framed in the High Court. In evidence the respondent agreed that he had driven the car away but that it was a condition of the contract that the appellant should carry out repairs. Although the advocate for the appellant objected to the evidence being given, he questioned his witness about the alleged repairs and addressed the judge thereon.

Judgment was given for the respondent on the ground that the appellant had failed to carry out an essential term of the agreement of sale. The appellant appealed, contending that the judge had no jurisdiction to decide the case on a ground which had not been pleaded.

Held –

- (i) a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision;
- (ii) on the facts the issue had been left for decision by the court as the advocate for the appellant led evidence and addressed the court on it.

Observations on the duty of both the court and the advocates to ensure that issues are framed.

Appeal dismissed.

Cases referred to in judgment:

- (1) *Bell v. Lever Bros.*, [1932] A.C. 161.
- (2) *Gandy v. Caspair* (1956), 23 E.A.C.A. 139.

The following considered judgments were read:

Judgment

Law JA: The suit out of which this appeal arises was instituted by a plaintiff alleging that during oral negotiations for the purchase of a second-hand motor car, but before any contract to buy was entered into, the plaintiff paid to the defendant Shs. 5,700/- being the proposed purchase price. The plaintiff went on to state that no contract was entered into and no sale effected, and the plaintiff claimed return of the

Shs. 5,700/- as money had and received. By its defence the defendant stated that the plaintiff and defendant had entered into a binding contract for the purchase of a motor car which was in fact sold and

delivered to the plaintiff who paid Shs. 5,700/- being the purchase price agreed under the contract. When the hearing of the suit began before Dalton, J. the plaintiff's advocate opened his case in the following words:

"Case to be decided on legal issues. Our case is that we paid for the vehicle before a contract was entered into, car not delivered in law."

In cross-examination the plaintiff was shown an invoice relating to a car No. KKE 392. This invoice bears the words "To sale of above car Shs. 5,700/-, paid cash Shs. 700/- cheque No. 1669085 paid Shs. 5,000/-". The plaintiff admitted that he had signed that invoice, that he had paid for the car, and that he had driven it away on the following day. On the day after he brought it back complaining that certain agreed repairs had not been done to the car. He left the car there and instructed advocates to claim the return of the purchase price. The plaintiff said in cross-examination "It was a condition of buying the car that the defendant's agent should carry out the repairs." He was supported in this by his witness Mr. Henry Kamau who said in the course of his evidence in chief:

"The plaintiff said the condition of his taking the car was that the defects should be put right."

At this stage Mr. Sharma for the defendant objected to questions being put about defects, no allegations to this effect having been made in the plaint, but he was over-ruled. Mr. Sharma repeated his objection in his final address, where he is recorded as having said, referring to the plaint, that the plaintiff has pleaded that no contract had been entered into; that the plaintiff had changed his case completely by alleging that there had been an agreement to sell which was conditional on repairs being effected; and Mr. Sharma submitted that evidence relating to a conditional sale should not have been allowed as the plaintiff was bound by his pleading. The judge gave no consideration to these submissions in his judgment. After a careful and detailed examination of the evidence, he held as follows:

"In any event in this case I believe the evidence of the plaintiff and his witness. I am satisfied that the plaintiff was willing to buy the car KKE 392 from the defendant if the repairs which the car obviously needed were carried out. . . . As the defendant failed to carry out an essential term of the agreement to sell the car, in my view the plaintiff is entitled to succeed in his claim against the defendant"

and he gave judgment for the plaintiff for Shs. 5,700/- with costs.

It is clear that the judge decreed in the plaintiff's favour on a ground which had never been pleaded, that is to say that there had been a contract of sale, but conditional on the doing of repairs; that this condition had not been performed; that this failure to do the repairs amounted to a breach of an essential condition going to the root of the contract and entitling the plaintiff to repudiate the contract. Not only had none of these matters been pleaded, but the cause of action based on a conditional sale was in direct contradiction to the pleaded cause of action, which was that there had never been a contract at all. Furthermore, the judge's favourable finding of credibility on the part of the plaintiff ignores the fact that the plaintiff must have been given a very different story in his instructions to his advocate from the story he told in court.

The defendant (to whom I shall henceforth refer as the appellant) has now appealed, and his main ground of appeal as expounded by Mr. Sharma is that the judge had no jurisdiction to decree on a ground which had not been pleaded. In support of this submission Mr. Sharma has cited a number of Indian authorities, which lay down that no evidence can be given on a cause of action which

has not been pleaded; and he relies on the dictum of Lord Atkin in *Bell v. Lever Bros.*, [1932] A.C. 161 at p. 216, that:

“... the judge on a trial with a jury has without consent of the parties no jurisdiction to determine issues of fact not raised by the pleadings.”

and on that of Sinclair, V.-P. in *Gandy v. Caspair* (1956) 23 E.A.C.A. 139:

“As a rule relief not founded on the pleadings will not be given.”

Mr. Sharma complains with some justification that the appellant came to court prepared to meet a case based on the absence of a contract, and that without amendment or adjournment the respondent was allowed to call evidence in support of a completely different and inconsistent case based on an unpleaded and repudiated contract, raising for the first time alleged conditions as to repairs, a case which the appellant had no reason to anticipate; and Mr. Sharma submits that the failure to amend the plaint so as to plead the new cause of action which emerged during the trial has caused serious prejudice to the appellant who had no opportunity to lead evidence, such as that of an expert, to meet the new case.

Mr. Malik-Noor for the respondent has urged, in a most able and attractive argument, that the grounds of appeal are highly technical, and that the appellant cannot succeed unless he can show that he has suffered hardship or prejudice amounting to a failure of justice. He submits that there was no failure of justice, as the appellant in fact called two witnesses, one of whom gave evidence about the alleged conditions relating to repairs. Mr. Malik-Noor submitted that even if the plaint had properly pleaded the cause of action, which he rightly conceded it had not done, the result must have been the same. He submits that the cause of action based on a concluded but conditional contract, which he again rightly conceded should have been the subject of an amendment to the plaint, became an issue which, by reason of the course taken at the trial was, notwithstanding Mr. Sharma's protests, left to the judge for decision as an issue. Mr. Malik-Noor has pointed out that Mr. Sharma, although he had objected to evidence being led in relation to an unpleaded cause of action questioned his own witness Mr. Abdul Rehman about the repairs, and whether they were a condition of the sale; and that in his final address Mr. Sharma argued that if there were conditions as to repairs they did not constitute a condition precedent, but amounted to no more than a breach of warranty not justifying repudiation of the contract.

On the point that a court has no jurisdiction to decree on an issue which has not been pleaded, the attitude adopted by this court is not as strict as appears to be that of the courts in India. In East Africa the position is that a court may allow evidence to be called, and may base its decision, on an unpleaded issue if it appears from the course followed at the trial that the unpleaded issue has in fact been left to the court for decision. In the case now before us, I am impressed by Mr. Malik-Noor's argument that although Mr. Sharma objected to evidence being led relating to the unpleaded issue, he cross-examined the other side's witnesses and led his own witness on this very issue; and although in his final address he objected to the new issue being considered unless made the subject of an amendment to the plaint, he nevertheless made submissions on the unpleaded issue. In these circumstances, although with some hesitation, I consider that the unpleaded issue was left to the judge for decision. I have no doubt the appellant was taken by surprise by the introduction of the unpleaded cause of action at the hearing, but although his advocate protested he did in fact, to some extent, participate in the consideration of this new cause of action, both by leading evidence and addressing the court with reference to it, and I am not satisfied that the procedural irregularities in the court below have in fact led to a failure of justice necessitating intervention by this Court. In other

words, it has not been shown to my satisfaction that in the event the decision in the court below was wrong.

This appeal might never have been brought if the true cause of action had been pleaded. Its omission from the plaint is reprehensible enough, but when it became clear early in the course of the trial that the claim was in fact based on a contract, which was the opposite of what had been pleaded, then it became the respondent's duty to have this new cause of action embodied in an amendment to the plaint. I would express my disapproval of the conduct of the respondent's case in the court below by depriving him of the costs of this appeal, and order that the appeal be dismissed but without costs.

Much of the confusion which arose at the trial would have been avoided if the provisions of O. 14 r. 5 requiring the framing and recording of issues had been complied with. Had issues been framed at the hearing, the necessity for amendment of the pleadings would immediately have become apparent, and much trouble and expense avoided. The prime responsibility to ensure that issues are framed lies on the court, but in my view the advocates also have a duty to see that this requirement is complied with by the court.

Duffus P: I have had the advantage of reading the draft judgment of Law, J.A. This is yet another case in which the pleadings are defective and this especially applies to the plaint. Pleadings should contain a concise statement of the material facts on which the party pleading relies. In this case the respondent, instead of setting out his facts rather set out a summary of the law on which he relied. Order 6 of the Civil Procedure (Revised) Rules 1948, applies to pleadings generally while O. 7 applies to the contents of a plaint. Generally speaking, pleadings are intended to give the other side fair notice of the case that it has to meet and also to arrive at the issues to be determined by the court. Order 14 of the rules deals fully with the settlement of issues for the determination of the suit and I entirely agree with Law, J.A. that if the trial judge had framed issues the present difficulties should not have arisen. I would particularly here refer to the provisions of O. 14 r. 1 (5) and r. 5 (1) which state:

"1(5) At the hearing of the suit the court shall, after reading the pleadings, if any, and after such examination of the parties or their advocates as may appear necessary, ascertain upon what material propositions of fact or law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend."

"5(1) The court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed."

It is therefore the duty of the court to frame such issues as may be necessary for determining the matters in controversy between the parties. Apart from these provisions the court has wide powers of amendment and should exercise these powers in order to be able to arrive at a correct decision in the case and to finally determine the controversy between the parties. In this respect a trial court may frame issues on a point that is not covered by the pleadings but arises from the facts stated by the parties or their advocates and on which a decision is necessary in order to determine the dispute between the parties.

In this case the real issue for determination and the issue on which the judgment is based was whether the contract was dependent on a condition precedent being carried out by the defendant/appellant. There can be no doubt that this issue was raised at the trial, that it was objected to by the appellant's advocate

but allowed by the judge and that both parties then called evidence on this issue which was finally determined by the court in the respondent's favour.

There has been an irregularity in the pleadings but this court will not usually interfere with a judgment if it is satisfied that there has been no failure of justice or lack of jurisdiction. I am satisfied that the issue was before the Court and that the parties were heard on the issue and the main question here is whether or not the appellant suffered any prejudice or injustice by the course that the proceedings took.

Mr. Sharma, for the appellant, complained that he was taken by surprise and that if the pleadings had been amended he would have sought an adjournment and have called further evidence. I have carefully considered this submission but it does appear that the issue was placed fully before the court and that Mr. Sharma did, in fact, call evidence on this issue and that he did not seek an adjournment to call any further evidence. With respect, I cannot see that the appellant suffered any real prejudice or injustice in this matter.

The trial judge appears to have had all the facts before him and to have come to a correct decision on these facts. In these circumstances I agree with Law, J.A. that the appeal be dismissed. I also agree with him that in view of the conduct of the respondent's case at the trial that it would be just and equitable to now deprive him of the costs of this appeal. It is unlikely that the appeal would have been brought if the pleadings and issues had been correctly framed and the blame for this is largely on the respondent.

Lutta, J.A. also agrees with the judgment of Law, J.A. and accordingly the appeal will be dismissed without any order as to costs.

Lutta JA: I also agree.

Appeal dismissed.

For the appellant:

M. G. Sharma

For the respondent:

S. A. Malik-Noor (instructed by *Archer & Wilcock*, Nairobi)

Mugo and others v Wanjiru and another
[1970] 1 EA 481 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	28 May 1970
Case Number:	17/1969 (102/70)
Before:	Duffus P, Spry VP and Lutta JA
Sourced by:	LawAfrica

[1] *Appeal – Notice of appeal – Filed after death of defendant – Notice valid.*

[2] *Appeal – Notice of appeal – Filed after death of defendant – Service – On former advocate of defendant not proper.*

[3] *Appeal – Out of time – Sufficient cause – Whether sufficient cause must relate to failure to file or may relate to the action generally.*

[4] *Appeal – Out of time – Notice of appeal not served – Court can extend time for filing appeal.*

Editor's Summary

The defendant in a civil case died prior to judgment without the knowledge of the advocates. The appellant filed notice of appeal and attempted to serve it on the advocate for the deceased respondent who refused to accept it.

Application was made to extend the time for filing the record of appeal, and on being granted was referred to the full court.

Held –

- (i) the notice of appeal was valid and effective notwithstanding the death of the defendant;
- (ii) the notice of appeal could not be validly served on the advocate for the deceased defendant (*Fry v. Moore* (1) followed);
- (iii) the fact that the notice of appeal has not been served does not deprive the court of power to extend the time for filing the appeal (*N.A.S. Airport Services Ltd. v. Attorney General* (2) followed);
- (iv) Normally sufficient reason for an extension of time must relate to the inability or failure to take the particular step;
- (v) because of the possibility of a breach of natural justice in the court below, sufficient cause for an extension had been shown.

Application for filing appeal out of time allowed.

Cases referred to in judgment:

- (1) *Fry v. Moore* (1889), 23 Q.B.D. 395.
- (2) *N.A.S. Airport Services Ltd. v. Attorney General*, [1959] E.A. 53.
- (3) *Farmers Bus Service v. Transport Licensing Appeal Tribunal*, [1959] E.A. 779.
- (4) *Shah v. Jamnadass*, [1959] E.A. 838.
- (5) *Bhatt v. Tejwant Singh*, [1962] E.A. 497.

The following considered judgments were read:

Judgment

Spry VP: This is a reference to the full court from the decision of a single judge (Law, J.A.) extending the time for filing a record of appeal. He held that there had been inordinate delay on the part of the applicants and that the affidavit which supported the application was defective, but he considered that

these considerations were outweighed by the possibility that there had been a breach of natural justice in the court below.

Mr. Khanna, who appeared for the respondents based his main argument on the fact that the successful party in the court below had died before the filing or service of the notice of appeal. The notice of appeal (which does not form part of the record before us) was presumably intitled in the same manner as the proceedings in the High Court (which incidentally appear to have been intitled incorrectly – see *Farmers Bus Service v. Transport Licensing Appeal Tribunal*, [1959] E.A. 779) and a copy of it was tendered, under r. 57 of the Eastern African Court of Appeal Rules, 1954, to Mr. Khanna, who had appeared for the deceased in the High Court. It is conceded that the death of the deceased was not then known to the applicants. Mr. Khanna refused to accept service and it is his contention that no process can issue in the name of a dead man, nor can service be effected on one. From this he argues that the application for extension of time to file the record of appeal was incompetent.

I may say here that in my opinion the notice of appeal that was filed was valid and effective. It was presumably filed in the High Court, as required by r. 54 (2), intitled in the same way as the previous proceedings in that court, and it was a notice to the court of intention to appeal. I cannot see that the death of the deceased, of which the applicants had no knowledge, affects the validity of that notice.

I find the question whether the purported service of the notice was effective much more difficult. On this question Law, J.A. said:

“Serving notice of appeal is not, in my view, analogous to instituting a suit: an appeal is in the nature of a continuation of a suit, and I consider that a notice served on the advocate on record of a deceased party, whose death has not been notified to the party seeking to serve the notice is perfectly good notice . . .”.

Rule 57, so far as it is relevant, reads:

“57(1) Where in any proceeding in a superior court a party has given an address for service, notice of appeal from any judgment, decree or order given or made in such proceeding may be served on such party at such address for service, notwithstanding that the address may be that of an advocate who has not been retained for the purpose of an appeal. . . .

(2) Every person who by virtue of service on him of a notice of appeal becomes a respondent to any intended appeal shall . . .”.

Mr. Khanna contended that this rule presupposes that the parties are living and cannot apply where the person against whom an appeal is intended to be brought is dead. He sought to reinforce his main argument by saying that an advocate’s retainer automatically ends on the death of his client. With respect, I do not think this is relevant, because it is clear that the application of r. 57 does not depend on the existence of a retainer. The rule is obviously intended to ensure that an intending appellant shall not lose his right of appeal by reason of inability to effect in time service on the respondent, whose whereabouts may be unknown. It might be argued that an intending appellant should be similarly protected where the respondent is dead, but I think there is merit in Mr. Khanna’s submission that a dead person cannot be served. The general principle appears clearly in a phrase used by Lindley, L.J., in *Fry v. Moore* (1889), 23 Q.B.D. 395, when, dealing with substituted service, he said:

“But there are certain principles which govern the rules, and in *Field v. Bennett* the Queen’s Bench Division laid down the principle, that, if a writ could not be served personally at the time when it is issued, there cannot be substituted service. That is a sound principle. You cannot affect a principal through an agent when you cannot affect the principal himself.”

I think that must apply to the service of a notice, just as much as to the service of a writ, and that since a dead man cannot be served personally, no purported service on an agent can be effective. It is on the person who is to be the respondent that service is to be effected and r. 57 only relates to the address for service. Moreover, service under sub-r. (1) has the effect, under sub-r. (2), of making the person served a respondent and I do not think a dead person can be made respondent. I think therefore that Mr. Khanna was correct in refusing to accept service of the notice of appeal and that the proper course for the applicants, when they were informed of the death, was to ascertain who were the personal representatives of the deceased, apply to the High Court to have their names substituted for that of the deceased and immediately thereafter apply to this Court for an extension of time in which to serve them.

I am, however, not convinced that the fact that this course was not followed necessarily makes the present application incompetent, as Mr. Khanna assumes. Rule 9 gives this court a very wide discretion in the matter of extending time. Clearly as a general rule the filing and service of the notice of appeal ought to be regularised before or at least at the same time as application is made to extend the time for filing the record and the fact that this has not been done might be a reason for refusing an application or only allowing one on terms as to costs. But it does not mean that such an application must be refused; indeed, in Civil Appeal 51 of 1969 (unreported) this court considered, although in the event it rejected, an application for extension of time for serving the notice of appeal after an extension of time for filing the record of appeal had been granted. The judgment of the court begins:

“We consider that the fact that the appeal has been filed does not deprive us of the power to deal with the instant application for leave to serve notice of appeal out of time; see *N.A.S. Airport Services Ltd. v. Attorney General*, [1959] E.A. 53.”

In my view, the present application is not incompetent merely because the notice of appeal has not been served.

Mr. Khanna's second submission was that an application under r. 9 may only be allowed “for sufficient reason” and he submitted that if there is no sufficient reason, there is no residual jurisdiction to extend time. In this connection, he stressed that Law, J.A., had said:

“there is apparent on the face of the evidence before me a distinct possibility – I put it no higher – that the proceedings in the court below were conducted in breach of the principles of natural justice.”

He had not held as a fact that there had been a breach of natural justice, and Mr. Khanna argued that the mere likelihood that an appeal may succeed is not a reason for extending time. I would agree to this extent, that I do not think the fact that an appeal appears likely to succeed can of itself amount to a “sufficient reason”. Normally, I think, the sufficient reason must relate to the inability or failure to take the particular step in time, but I am not prepared to say that no other consideration may be invoked. Here the position is that on an application for an order of prohibition, the judge is alleged to have granted the application without allowing the parties an opportunity of addressing the court, the only hearing having been concerned with an application for adjournment on which no ruling was given. If that is so, and it is not seriously disputed, the order was in my opinion a nullity, and these extraordinary circumstances might properly, in my view, be regarded as constituting “sufficient reason”. In this connection, Mr. Khanna submitted that while a judgment given against a party without allowing him to call his evidence would be a nullity, the failure to give a party an opportunity of addressing the court, on an application where

the evidence was all by way of affidavit, was a mere irregularity and therefore, under s. 79A of the Civil Procedure Act, not itself a ground for reversing the order. He based this submission on the argument that a party may waive the right to address the court. In my opinion, the question is not whether a party has addressed the court, but whether he has had the opportunity to do so, and if he has not had that opportunity, I do not think the court has jurisdiction to pronounce judgment (see s. 25 of the Act).

Mr. Khanna's third submission which is linked to his second submission, was that the right of appeal is in fact barred by s. 79A. For the reasons I have given, I would reject that submission.

On the application generally, Law, J.A., directed himself fully regarding the ground on which the application might, and in other circumstances would, have been rejected. Having done so, he exercised his discretion to allow the application. I am not convinced that he erred in so doing: on the contrary, I think his decision was, in the very special circumstances of this case, correct. I would only vary his decision in one respect. The extension of time to file the record of appeal will not assist the applicants unless and until they cause the respondents to be brought on the record and obtain an extension of time to serve the notice of appeal, and then effect such service. These matters must be dealt with before the intended appeal can proceed, but they are not entirely within the control of the applicants. I think, therefore, that the extension of time by thirty days for filing the record of appeal should run from the date of such service, but I would give the respondents leave to move the court at any time if in their submission the applicants fail to show due diligence.

On the question of costs, the reference has failed but I think Mr. Khanna was right in his submission regarding the service of the notice of appeal, although I do not agree as regards the consequences, and the greater part of the time taken by the hearing of the reference was concerned with this question. Moreover, the applicants have been given an indulgence, notwithstanding default that would normally have disentitled them to it, and it is not yet certain whether the order that the applicants have obtained will prove of any value to them. On the whole, I think the fairest order would be that the parties bear their own costs of the reference.

Duffus P: I have had the advantage of reading the judgment of Spry, V.-P. in draft form. Several important and difficult issues arise in this matter. The first question is as to the power of this court to extend time under the provisions of r. 9 of the East African Court of Appeal Rules, 1954. This is a very wide power limited only by the words "for sufficient reason" and has been the subject of numerous reported decisions of this court. Each application must be decided in the particular circumstances of each case but as a general rule the applicant must satisfactorily explain the reason for the delay and should also satisfy the Court as to whether or not there will be a denial of justice by the refusal or granting of the application. In this connection I would again refer to the much-quoted passage from the judgment of Corrie, Ag. J.A. in the decision of this court in *Shah v. Jamnadas*, [1959] E.A. 838 at p. 840.

"The object of including r. 9 in the rules of court is to ensure that the strict enforcement of the limitations of time for filing documents prescribed by the rules shall not result in a manifest denial of justice. It is thus essential, in my view, that an applicant for an extension of time under r. 9 should support his application by a sufficient statement of the nature of the judgment and of his reasons for desiring to appeal against it to enable the court to determine whether or not a refusal of the application would appear to cause injustice."

This, however, is only the general rule. Thus, in the case of *Bhatt v. Tejwant Singh*, [1962] E.A. 497, this court decided that there was “sufficient reason” where the delay had been attributable entirely to the courts, and did not consider the merits of the case. Having regard to the particular circumstances of this case, Law, J.A. in my view correctly exercised his discretion on the ground that there was, on the face of the evidence before him, a distinct possibility that there had been a breach of natural justice resulting in a judgment having been given in the court below without the parties having had the opportunity of being heard. I would note here that although Law, J.A. has found that there was inordinate delay on the part of the applicant in filing his record of appeal, that the application did, in fact, set out the reasons for this delay. On the merits of this application I entirely agree with Law, J.A. that “sufficient reason” was shown for the exercise of his discretion in granting an extension of time.

There are, however, further difficulties in this case. The respondent died in between the purported hearing of an application for adjournment and the judgment which followed on the merits of the case. Apparently he died without the knowledge either of the advocates or of the court until after delivery of the judgment. It has not been argued that the fact of his death affected the judgment and in any event, even if it did, it is this judgment which is now the subject of this appeal. I agree with the Vice-President that the filing of the notice of appeal in court was in the circumstances here valid and effective. However, Mr. Khanna’s main submission before us was that the notice on the respondent was served on the advocates for the respondent “on the record” after the respondent’s death, and the service was therefore invalid and void.

I agree with Law, J.A. that an appeal can be regarded as a continuation of a suit but where a sole plaintiff dies during the course of the hearing then if the cause of action survives the general rule is that the hearing is stayed until the court makes an order for the legal representatives of the deceased plaintiff to be made a party to the action. (O. 23, r. 3 applies.) I also agree here with the Vice-President that service on the advocate of the respondent is bad; as he points out the respondent being dead could not be served and therefore service on his purported agent must also be of no legal effect.

Apart from this basic principle it is clear on referring to the Court of Appeal Rules themselves, that service must be made on a respondent, or his agent, capable of acting and of filing his address for service in the appeal as provided by r. 57 (2). In this case the respondent is dead and therefore incapable of acting and his former advocate cannot act as his retainer ceased on the death of the respondent and he no longer had any authority to act on his behalf. I agree that the provisions of r. 57 cannot apply in circumstances where the party concerned has died.

I also agree that in the circumstances of this case, where judgment has been given and an appeal entered, the next step necessary is for the legal representatives of the deceased respondent to be substituted in his place. This application could either be made by the legal representatives themselves if they desire to enforce the judgment or by the appellants if they desire to continue the appeal. When this substitution has been effected it will then be necessary for a further application to be made to this court for an extension of time within which to serve the legal representatives with the notice of appeal.

As the Vice-President has pointed out, this court has the power to now grant the present application for an extension of time for the filing of the record although, in fact, this application is premature and can only be granted subject to the conditions I mention having been fulfilled. In my view, the usual course in circumstances like this would have been to either adjourn this application until the necessary preliminary steps had been completed or to have refused

this application as being premature. This case, however, has already involved the parties in a great deal of expense and delay over a fairly simple question and this application for an extension of time has been fully argued before Law, J.A. and again before this Court and the merits of this application have been fully considered. I would therefore, with the object of saving the parties further delay and expense, agree with the Vice-President that the order of Law, J.A. be confirmed but subject to the substitution of the respondent's legal representatives as parties and of an extension of time to serve the respondent's with a notice of appeal being made and the notice of appeal then being duly served.

I agree with the order proposed by the Vice-President including his order as to costs and as Lutta, J.A. also agrees it is accordingly ordered that the ruling of Law, J.A. granting an extension of time for the filing of the record of appeal be confirmed but subject to (a) the legal representatives of the respondent being made parties to the suit; (b) leave being then obtained to serve the legal representatives with a copy of the notice of appeal out of time; and (c) the legal representatives then being duly served, and on these requirements being carried out, there will then be an extension of 30 days as from the date of service of the notice of appeal for the filing of the record of appeal. On the question of costs, we maintain the order of Law, J.A. granting the costs of the application to the respondent in any event but we order that each party bear their own costs of the reference to the full court. Leave is granted for the respondents to apply to this court should there be any further inordinate delay in the carrying out of the order of this court.

Lutta JA: I have read and entirely agree with the judgments of the President and the Vice-President and there is very little that I need to add.

On the death of any person, a cause of action subsisting against or vested in him survives against, or for the benefit of, his estate – see s. 2 of the Law Reform Act. The appellants are entitled, if they wish to continue with the proceedings, to apply to substitute the legal representatives for the deceased party and then apply under r. 9 for an extension of time for service of notice of appeal on the legal representatives.

There is nothing on the record to show that the appellants, after it had been intimated to them on 25 June 1969 that Mr. Kaime died on 19 April 1969, applied to the court to continue the proceedings in the name of Mr. Kaime's legal representatives. We were told from the bar that an application had been made and a ruling was awaited. However, the proceedings have been continued in the name of Wanjiku daughter of Karumba and Karungari daughter of Wanjohi, both executrices of Mr. Kaime, since August 1969. In my view, the important question here is whether the appellants showed "sufficient reason" in terms of the decision in the case of *B. D. Shah v. Jamnadas & Co. Ltd.*, [1959] E.A. 838, for the exercise of discretion by Law, J.A., in granting an extension of time for the filing of the intended appeal. In view of the special circumstances of this case, which were fully considered by Law, J.A., I consider that he exercised his discretion properly, and I also agree with the Order proposed by the Vice-President.

Application allowed.

For the applicants:

S. C. Gautama

For the respondents:

D. N. Khanna (instructed by *Khanna & Co.*, Nairobi)

[1970] 1 EA 487 (HCK)

Division: High Court of Kenya at Nairobi
Date of judgment: 23 February 1970
Case Number: 1320/1968 (103/70)
Before: Kneller J
Sourced by: LawAfrica

[1] *Natural Justice – Opportunity to meet charge – Right to be heard – No right where not provided by regulations – Regulations for the East African Community Service Commission.*

[2] *Jurisdiction – Exclusion of Jurisdiction of court – Express words necessary – Public Service Act 1962, s. 16 (E.A.C.).*

Editor's Summary

The plaintiff was employed by the defendant in the East African Railways Corporation. The general manager of the Corporation started disciplinary proceedings against the plaintiff and gave him a statement of the charges against him. The regulations gave the plaintiff a right to answer in writing but not to appear personally. The Secretary-General of the defendant concluded the disciplinary proceedings against the plaintiff and expressed himself to be acting for the Community Service Commission on a date when power to act was vested in himself as successor of the previous Commission. As a result the plaintiff was demoted and lost salary.

On the plaintiff's action for arrears of salary and a declaration that the demotion was void, the defendant contended that no actions of a commission can be enquired into by any court. The plaintiff contended that the action was not against the Commission, that there had been a denial of natural justice in not allowing him to appear personally, and that the Secretary-General had not been acting for himself in the determination.

Held –

- (i) that the action was against the Community and not against the Service Commission did not affect the protection against court action given by the Public Service Act 1962, s. 16;
- (ii) the Secretary-General correctly concluded the disciplinary proceedings against the plaintiff;
- (iii) that the plaintiff was given no opportunity to appear personally was not a denial of natural justice (*University of Ceylon v. Fernando* (8) followed).

Case dismissed.

Cases referred to in judgment:

- (1) *Albon v. Pyke* (1842), 4 Mand G. 421.
- (2) *Board of Education v. Rice*, [1911] A.C. 179.

- (3) *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109.
- (4) *In re s. 24 Milling Ordinance 1952* (1954), 2 T.L.R. (R) 205.
- (5) *London Hospital Governors v. Jacobs*, [1956] 1 W.L.R. 662.
- (6) *Re Marles' Application*, [1958] E.A. 153.
- (7) *Byrne v. Kinematograph Renters Society Ltd.*, [1958] 2 All E.R. 579.
- (8) *University of Ceylon v. Fernando*, [1960] 1 All E.R. 631.
- (9) *De Souza v. Tanga Town Council*, [1961] E.A. 377.
- (10) *Ridge v. Baldwin and others*, [1964] A.C. 40.
- (11) *Anisminic Ltd. v. Foreign Compensation Commission and another*, [1969] 1 All E.R. 208.

Judgment

Kneller J: Counsel for the East African Community, the defendant, has taken a point in limine: he submits this court may not inquire into this matter.

He bases this on s. 16 of the Public Service Act 1962, (Community Act 6 of 1962) which I shall call “the Act”. Section 16 provides:

“16. The question whether –

- (a) any Commission has validly performed any function vested in it by this Act;
- (b) any member of a Commission or any other person or authority has validly performed any function of the Commission delegated to such member or other person or authority under this Act; or
- (c) any member of a Commission or any other person or authority has validly performed any other function in relation to the work of the Commission or in relation to any such function as is referred to in the preceding sub-paragraph,

shall not be inquired into in any court.”

But, first, does this Community Act bind the High Court of Kenya? It does. The provisions of the Act have the force of law in Kenya from the date of the publication of the Act in the gazette of the Community: s. 8 (1) Treaty for East African Co-operation Act 1967.

And then, secondly, what are the facts? I must assume them to be correctly set out in the pleadings or presented in statements by counsel from the bar during the course of argument.

The plaintiff was in May 1968, Chief Supplies Officer at Nairobi in the East African Railways Corporation.

The East African Community was, and is a body corporate, in the terms of s. 3 of the Kenya Treaty Act.

The plaintiff was employed by the defendant at an annual salary of Shs. 54,600/- together with free housing or an allowance for housing. He was a group 3B officer, according to his contract of service. Disciplinary proceedings were begun against him in August 1967, by the General Manager of the Corporation under reg. 47 of the Regulations for the East African Community Service Commission. He sent him a statement of the charges calling on him to state in writing any grounds on which he relied to exculpate himself, which the plaintiff did.

One of the punishments that may be inflicted upon an officer as a result of proceedings under Part IV – Discipline – of the Regulations is reduction in rank – reg. 57 (1) (b).

The plaintiff throughout all this was entitled to know the whole case against him and have an adequate opportunity of making his defence but had no right to appear before the Secretary-General or the Commission: reg. 47 (1) (a) (e).

The Secretary-General acting as the Commission purported to conclude the matter against the plaintiff on 29 December 1967. The Commission did not begin to exercise disciplinary control, however, until 1 January 1968 (Community Legal Notice No. 10 of 1967), and later, when it did referred this point to a Board of Inquiry but the board decided not to proceed with. On 29 May 1968 the general manager wrote

to the plaintiff and reduced him in rank and salary on the orders of the Commission.

The plaintiff fell, in rank, from group 3B to group 6B and, in salary, from Shs. 54,600/- to Shs. 36,600/- a year and, with a last turn of the screw, it was

all made to take effect from the end of January 1968. The drop in salary Shs. 1,500/- a month.

Incensed by this loss the plaintiff claims that the defendant, its servants or agents, did this wrongfully, without justification and in breach of the contract between them. He prays for damages for arrears of salary till his former higher salary is restored to him, a declaration that his reduction in rank and salary is and was null and void and an injunction restraining the defendant from behaving like this in the future.

He claims that if this reduction took place under the Act and regulations it was in excess of the Commission's jurisdiction and a nullity which opens the matter wide for the court to investigate.

The next thing to do is to record some of the background to s. 16 of the Act so that we can understand why the Secretary-General and the Commission are involved.

Section 16 is found under Part IV of the Act which is headed:

"Powers and Privileges of Service Commissions" and the side note reads:

"Protection of Commissions from legal proceedings."

There used to be three Commissions under the Act. Section 5 called the one for the Railways and Harbours Administration the Railways and Harbours Service Commission.

The long title to the Act was:

"An Act to make provision for the Constitution and Functions of a Public Service Commission, a Railways and Harbours Service Commission and a Posts and Telecommunications Service Commission and to vest responsibility for Public Service in the East African Common Services Organisation in these Commissions."

This was deleted by the Treaty for East African Co-operation (Implementation) (Adaptation of Laws) Order 1967 in December of that year and

"An Act to make provision for the Constitution and Functions of a Public Service Commission and to vest responsibility for the Public Service of the East African Community in that Commission;"

was substituted.

Until December 1967, power to appoint persons to hold or act in offices in that part of the public service consisting of the Corporation (including power to make appointments on promotion and transfer and to confirm appointments) and to exercise disciplinary control over persons holding or acting in such offices and to remove from office persons so appointed was vested in the Railways and Harbours Administration by s. 13 (1) of the Act.

Then on 1 December 1967, by art. 62 of the Treaty for East African Cooperation and when the Order came into operation, the Railways and Harbours Commission with the other two Commissions was replaced by the new East African Community Service Commission. It also repealed s. 11 of the Act and replaced it with a new one giving in sub-s. (1) the power of appointment to hold or act in offices in the Community (including power to make appointments on promotion and transfer and to confirm appointments) and to exercise disciplinary control over persons holding or acting in such offices and to remove from office persons so appointed to that Commission but in sub-s. (3) exempting from the power of appointment only the Corporation.

The Authority, on 1 December 1967, in exercise of the powers conferred by

s. 82 of the East African Harbours Corporation Act 1967 conferred upon the Board of Directors, appointed under s. 81 of that Act, power to make appointments (including power to make appointments on promotion and transfer and to confirm appointments) to the service of the East African Railways and Harbours Administration.

So in December 1967 the Board of Directors handled the Corporation's appointments and the Commission its discipline.

On 1 December 1967, by Community Legal Notice 10 of 1967, of the same date, 1 January 1968 was marked as the appointed day upon which the powers in s. 11 of the Act vested in the East African Community Service Commission.

The combined effect of the Act and Regulations, according to counsel, established a commission independent in character, free from any external control or direction, political patronage or political victimization which was necessary for its proper functioning. The members were protected and privileged in case of any action or suit to the same extent as a judge of the High Court, unauthorised disclosure of information was prohibited and its communications were privileged.

The Commission was entrusted under the Act with a special and defined task, and having regard to the nature and purpose of their adjudication the legislature decreed that its decision should be final. Whether or not there was also a fear of thwarting delays or of appeals or of the disclosure of embarrassing facts if the courts inquired into matters mentioned in s. 16 is no part of my present duty to discover.

Meanwhile, for the intervening year, from 1 December to 31 December 1967, the Secretary-General of the Community performed the functions of the old Railways and Harbours Service Commission and the future East African Community Service Commission: see s. 11 of the Act; art. 90 and Annex XV para. 3 of the Transitional Provisions of the treaty.

He was to conclude outstanding matters which had been commenced, but not finally determined, by any commission established under the provisions of art. 40 of the Constitution of the East African Common Services Organization and before the East African Community Service Commission provided for in the Public Service Act 1962 began: reg. 63 (1): and in exercising those powers he was, so far as was practical, to follow the regulations as to procedure.

So much for the setting of s. 16 of the Act. Now we have to look at the law on this.

If the legislature intends to exclude the jurisdiction of all courts, including superior ones, express words or necessary implication are necessary: *see Albon v. Pyke* (1842), 4 Man. & G. 421 at p. 424 Tindal, C.J. "Very clear words will be required to oust altogether the jurisdiction of the Queen's courts in matters of private rights" said Lord Evershed, M.R. in *London Hospital Governors v. Jacobs*, [1956] 1 W.L.R. 662 (and see generally Craie's *Statute Law* (6th Edn. 1963), pp. 122-124 inclusive).

Once there are such plain words then this court is deprived of any jurisdiction to question the decision of the Commission its servants or agents or inquire into it. *Cf. In the matter of s. 24 of the Milling Ordinance, 1952 etc.* (1954), Vol. 3 T.L.R. (R) 205, 206 and *Re Marles' Application*, [1958] E.A. 153, 157.

Counsel for the plaintiff accepts all that. He claims, however, that s. 16 of the Act does not apply here.

First, he argues, because the parties are the plaintiff and the defendant, and not the Secretary-General or the Commission, s. 16 is irrelevant. This is unarguable, in my view, for, no matter who the parties are,

the nub of the issues

between them is whether or not the Secretary-General and all the Commission's actions, in relation to the plaintiff, were valid or invalid and that brings us straight back to s. 16 and its effect on this suit.

Secondly, the Secretary-General in a letter of 29 December 1967, purported to conclude the matter "acting for" the Commission. He was supposed to do this on his own account, according to reg. 63, and not for the Commission, whose disciplinary powers were not vested in it for another three days. This was not a conclusion at all by the Secretary-General, says the plaintiff, under the Act or its regulations, and so s. 16 does not operate to exclude enquiry by a court of law in the present case: see *Anisminic, Ltd. v. The Foreign Compensation Commission and another*, [1969] 1 All E.R. 208. This argument cannot prevail. I accept that an exclusion section such as s. 16 must be construed strictly, because it denies citizens access to their courts, but I hold that it would be unreasonable to find that because the Secretary-General signed a letter "acting for" the Commission he did not conclude the matter and it was therefore open to enquiry by a court. This would be more than strictly construing the section and amount to an inappropriate respect for technicality. Nor is it correct, in my opinion, to say that the Commission concluded the matter, when it clearly could not do so for the Secretary-General concluded it but incorrectly wrote he was acting for the Commission.

A point not touched upon by either Counsel was whether or not s. 16 "protected" the Secretary-General when he acted under the amended reg. 63 in the interim period. I hold that he was so shielded by s. 16 (b) and (c), which is very wide.

Thirdly, it was said, the regulations were not followed because the defendant was given no opportunity to be heard in his defence. Where the regulations set out a procedure in such matters and it is not scrupulously followed a purported determination or decision is void (or voidable?) because a condition precedent has not been followed: *Hypolito Cassiano de Souza v. Chairman and Members of the Tanga Town Council*, [1961] E.A. 377; *Ridge v. Baldwin and others*, [1964] A.C. 40. The regulations, as I have shown in the facts, did not provide for an opportunity for the plaintiff to be heard in his defence but of making his defence, which he did, in writing specifying the grounds on which he relied to exculpate himself: reg. 47 (1) (a) (c) and (e).

Fourthly, and finally, I understood counsel for the plaintiff to say that, even if the regulations did not provide for the plaintiff to appear before the Secretary-General and or Commission, and he did not do so, or was not permitted to do so, the principles of natural justice had not been observed and the decision or determination was void (or voidable). Whether or not the requirements of natural justice have been met by the procedure adopted in any given case must depend on the facts and circumstances in each case, e.g.

"... The nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with and so forth."

as Tucker, L.J. said in *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109 at p. 118. Lord Loreburn in the *Board of Education v. Rice*, [1911] A.C. 179 at p. 182 added that the tribunal was under a duty to act in good faith and listen fairly to both sides because that is what anyone who decided anything should do. There was no call to treat the question as if it were a trial. There was no power to administer on oath or to call witnesses. Nearly half a century later Harman, J., as he then was, in *Byrne v. Kinematograph Renters Society, Ltd.*, [1958] 2 All E.R. 579 at p. 599 said this:

"What, then, are the requirements of natural justice in a case of this kind? First, I think that the person accused should know the nature of the

accusation made; secondly, that he should be given an opportunity to state his case; and, thirdly, of course, that the tribunal should act in good faith. I do not think that there really is anything more.”

All of which was approved by the Privy Council in the *University of Ceylon v. Fernando*, [1960] 1 All E.R. 631 at p. 638. And now by these standards, which I respectfully apply, the plaintiff cannot be heard to say the principles of natural justice were not observed.

The upshot is, then, that the submission succeeds. This court may not inquire into this matter. The plaintiff’s claims for the difference in salary, a declaration, an injunction and other relief must all be dismissed with costs.

Case dismissed.

For the plaintiff:

S. S. Rao (instructed by *A. R. Kapila & Co.*, Nairobi)

For the respondent:

J. M. Khaminwa (Counsel to the Community)

The Commercial Bank of Africa Ltd v Income Tax [1970] 1 EA 492 (HCT)

Division:	High Court of Tanzania at Dar es Salaam
Date of judgment:	8 April 1970
Case Number:	16 and 17/1969 (104/70)
Before:	Georges CJ
Sourced by:	LawAfrica

[1] *Income Tax – Capital or income payment – Subsidiary having deficit receiving grants from parent company – Whether grants made to protect subsidiary’s capital or to supplement its trading receipts.*

Editor’s Summary

The appellant company commenced its business as bankers in 1961. From 1962 to 1965 it suffered losses each year. It received annually from its parent company a subsidy equivalent to its operating loss for the year in question. The respondent contended that these grants should be treated as trading receipts and therefore liable to tax. The appellant argued that they were capital grants made to protect the capital position of the Company as required under the Banking Act and not to protect profitability.

Held –

- (1) the grants were made to meet current trading losses of the subsidiary.

Appeals dismissed.

Cases referred to in judgment:

- (1) *Smart v. Lincolnshire Sugar Co. Ltd.*, 20 Tax Cas. 643.
- (2) *Pontypridd and Rhondda Joint Water Board v. Ostime*, [1946] 1 All E.R. 668.
- (3) *British Commonwealth International Newsfilm Agency Ltd. v. Mohany*, 40 Tax Cas. 550.

Judgment

Georges CJ: Two appeals have been consolidated for hearing in this matter, the facts of which are as follows:

The appellant company, which is now in voluntary liquidation formerly carried on business as bankers in Dar es Salaam and elsewhere in Africa. It is

a wholly owned subsidiary of the Financial Corporation for overseas countries, a company incorporated in Geneva.

Between the date of commencing business – 27 November 1961 to 31 December 1962 the company had an operating loss of Shs. 352,864/-. In the light of this it received a grant from the parent company of Shs. 360,000/-. From 1 January 1963 to 31 December 1963 there was an operating loss of Shs. 1,000,786/75 and the parent company made it a grant of Shs. 1,100,000/-. From 1 January 1964 to 31 December 1964 there was an operating loss of Shs. 1,170,552/38 and the parent company made a grant of Shs. 1,170,000/-. For the year 1 January 1965 to 31 December 1965 there was an operating loss of Shs. 443,700/- and the parent company provided a grant of Shs. 456,500/-.

The Commissioner General contends that these grants should all be treated as trading receipts liable to be brought to account for tax. The appellant contends that they are capital grants not liable to tax. From the bundle of correspondence which the appellant company tendered by consent it would appear that the tax authorities were at first agreeable to treating these sums as capital and having the losses carried forward against probable profits in later years but this is of no relevance.

As a bank which came to be registered after the enactment of Banking Act (Cap. 430) the appellant company would have had to have a capital of not less than Shs. 2,000,000/-. It would have had to maintain a reserve fund before any profits could be paid. It would have had to submit a balance sheet to the Registrar who was charged with supervising the affairs of Banks in relation to the Ordinance and ensuring their compliance with its provisions.

Mr. Le Pelley argued that against this background it was clear that these early losses at the commencement of business before any profit could be made would be clearly losses of capital and the grants were made in order to protect the capital position of the company so that it would at all times be quite plainly seen to satisfy the provisions of the Banking Ordinance. They were not made to protect profitability.

The fact that the payments may have been made for that purpose does not mean that they were capital payments. Capital could be preserved by providing a subsidy to meet current trading losses and this, it appears to me, is what was done in this case. No doubt it could have been arranged otherwise. The parent company could have purchased more shares in the subsidiary thus replenishing the capital and making up for the trading losses which had to be met from it. There is no indication that they did this. It seems hardly appropriate in the absence of any evidence to speculate upon a possible arrangement which could have been made which would have avoided the incidence of tax and then conclude that that was indeed the arrangement which had been made.

On the facts there was an annual grant made – not obligatory in sense – to meet the trading loss. It was a subsidy – though a voluntary one. There are no East African authorities on the point. There have been cases of subsidies decided in the English Courts and the principle underlying these cases has been tersely summarised by Viscount Simon in *Pontypridd and Rhondda Water Board v. Ostime*, [1946] 1 All E.R. 668:

“... subject to the exception hereinafter mentioned [which is not relevant in the circumstances here] payments in the nature of a subsidy from public funds made to an undertaker to assist in carrying out the undertaker's trade or business are trading receipts, i.e. are to be brought into account in arriving at the balance of profits or gains under Schedule D.”

The case cited as an illustration of that principle was *Smart v. Lincolnshire Sugar Co. Ltd.*, 20 Tax Cas.

643. In that case the Government made payments

to sugar manufacturers as a subsidy. This would have been repayable wholly or in part in the event of the price of sugar rising above a certain level. This it never did. The company entered the subsidies in its books as a repayable loan and contended that they were capital payments and not trading receipts. The Tax authorities contended that they were trading receipts. In the House of Lords Lord Macmillan delivered what was a unanimous opinion in the course of which he said:

“But in my view the question ought not to be decided merely on verbal argument. What to my mind is decisive is that those payments were made to the Company in order that the money might be used in their business. . . . We are told in the stated case that it was because of an apprehension that the companies might not be able to pay to the growers of beet the prices that they had contracted to pay that this further assistance was given by Government. It is true that the appellants apparently did not actually require to have recourse to the ‘advances’ they received. . . . But if the Company had not happened to be able to pay for their raw material otherwise they could properly have used their advances for this purpose. It was with the very object of enabling them to meet their trading obligation that the ‘advances’ were made; they were intended artificially to supplement their trading receipts so as to enable them to maintain their trading solvency.”

In this case the applicant in the first four years of trading when no profits had been made lost nearly Shs. 3,000,000/- more than the minimum capital it would have needed to be granted registration. Unless it had received the subsidies continued trading might have been impossible as the Registrar might well have thought that the interests of depositors would be jeopardised. The subsidies enabled the appellant company to maintain their trading solvency.

Mr. Le Pelley argued that the particular relationship of the appellant company as a wholly owned subsidiary of the giver of the subsidy affected the situation. I do not think it does. There is usually some special relationship between the giver of a subsidy and its recipient.

In *British Commonwealth International Newsfilm Agency Ltd. v. Mohany*, 40 Tax Cas. 550, a relationship existed not basically dissimilar from the relationship in this case. The appellant company had been set up in March 1957 by the Rank Organisation Ltd. and the British Broadcasting Corporation for the purpose of providing a news-film service. The parties agreed to pay half the deficit of the appellant company until the year 1964-5. Rank Organisation paid its half of the deficit to the appellant company having deducted the appropriate amount for tax. The appellant company sought to recover the tax deducted. The Special Commissioners disallowed the Company’s claim finding that the sum paid to the company was a trading receipt. This was upheld on appeal. The appellant company receiving the subsidy in that case was a subsidiary of the company granting the subsidy. The parent company held 50 per cent of its shares not 100 per cent. But the difference in the percentage of ownership does not seem to me to affect the principle involved. Lord Mac-Dermott thought that the payment in that case was:

“in substance and in form a payment made to a trading company as a supplement to its trading revenue in order to preserve its trading stability.”

The statement neatly covers the facts in this case.

That the payments were voluntary and not made under any legal compulsion appears to be irrelevant once their exact nature has been determined.

Accordingly I would hold that both the appeals fail, and the grants must be brought to account for tax purposes.

Appeals dismissed.

For the appellant:

P. Le Pelley (instructed by *Hamilton Harrison & Mathews*, Nairobi)

For the respondent:

J. M. Khaminwa (Counsel to the Community)

Mahuku v Uganda
[1970] 1 EA 495 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	22 June 1970
Case Number:	61/1970 (108/70)
Before:	Duffus P, Spry VP and Mustafa JA
Sourced by:	LawAfrica
Appeal from:	The High Court of Uganda – Sheridan, Ag. C.J.

[1] Criminal Practice and Procedure – Sentence – Committal to superior court for sentence – After sentence of imprisonment imposed – Preventive detention sentence. Thereafter illegal – Habitual Criminals (Preventive Detention) Act, s. 2 (U.).

Editor's Summary

The appellant was convicted on his plea of guilty by a Magistrate Grade II who sentenced him to imprisonment. Thereafter a Chief Magistrate sentenced him to a period of preventive detention to commence after the end of the period of imprisonment.

Held –

- (i) an accused cannot be committed for sentence to another magistrate after he has already been sentenced;
- (ii) a sentence of preventive detention can only be imposed by the court originally sentencing the accused.

Appeal allowed.

No cases referred to in judgment.

Judgment

The considered judgment of the court was read by **Duffus P:** This is a second appeal from the judgment of the Chief Justice. The case had rather unusual features and the Chief Justice gave leave to appeal to

this court as he felt that a question of law arose as to whether the appellant could be separately sentenced by two magistrates on the same charge.

The appellant was charged with other persons before the magistrate grade II at Entebbe on a charge of shop-breaking and larceny. He pleaded guilty on 23 September 1968. Various adjournments took place and the appellant was again brought before the magistrate grade II on 22 October 1968 and again charged on an amended charge of shop-breaking and larceny. Again he pleaded guilty, and his plea was entered. A question of the appellant being subject to preventive detention was raised, and the magistrate grade II reserved sentence until 13 November 1968. On that date there is a note on the record that the sentence will be passed by the Chief Magistrate at 2.00 p.m. and indeed the appellant was brought before the Chief Magistrate on that date when the Chief Magistrate ordered that the appellant and the other three accused persons be remanded in custody until 20 November 1968 for sentence. The case came back before the magistrate grade II on that date and then back to the Chief Magistrate on 4 December 1968 when the Chief Magistrate again ordered the three persons to be remanded in custody for sentence on 11 December 1968. On 11 December 1968 the appellant and the other accused again appeared before the magistrate grade II, before whom they had pleaded guilty and the magistrate grade II then proceeded to pass sentence on all four accused: the appellant was sentenced to 18 months' imprisonment and then the magistrate made this further order:

“The sentence of preventive detention on A1 will be passed by the Chief Magistrate on 18 December 1968.”

A magistrate grade II has no jurisdiction to pass a sentence of preventive detention. On 18 December 1968 the appellant was duly brought before the Chief Magistrate, there were further appearances and adjournments on 8 January 1969, 15 January 1969, 22 January 1969, and finally on 29 January 1969, when all the necessary formalities under the Preventive Detention Act had been completed, the Chief Magistrate sentenced the appellant to ten years’ detention, to commence after he had served the sentence of 18 months’ imprisonment.

The matter came on appeal before the Chief Justice. The Chief Justice found that there had been irregularities at the trial. First he pointed out the deplorable delay of the court in dealing with this case despite the fact that the appellant had consistently pleaded guilty. Then he pointed out that the magistrate grade II had never formally convicted the appellant as he should have done and further pointed out the irregularity of the magistrate grade II sentencing the appellant after the Director of Public Prosecutions had intimated that he was going to ask for sentence of preventive detention. He observed that all the sentences should have been given by the Chief Magistrate. However, the Chief Justice was of opinion that these irregularities had not occasioned a failure of justice and he applied the provisions of s. 347 of the Criminal Procedure Code and maintained the conviction and sentence of 18 months and the order for preventive detention but reduced the period from 10 years to 7 years.

The Chief Justice, however, found that there was a point of law as to whether two magistrates could order separate sentences on the same charge and he accordingly granted leave to appeal to this court.

This is largely a question of the jurisdiction of the two magistrates and we will first consider whether the magistrate grade II had power to sentence the appellant and then to commit him for a further sentence or order by the Chief Magistrate under the Preventive Detention Act.

The power for a magistrate to commit a convicted person to another magistrate for sentence is contained in s. 10 (4) of the Magistrates’ Courts (Amendment) Act 1966, (20 of 1966) which states inter alia:

“10(4) Where a magistrate’s court presided over by a Magistrate Grade I, II or III, convicts a person of an offence and the court is of the opinion that greater punishment should be imposed than the court has power to impose under the provisions of subsection (2) of this section, the court may commit him to a magistrate’s court presided over by a Chief Magistrate for sentence.”

It is to be noted here that the Magistrate’s power is to commit him for sentence and not to first sentence him and then commit him for a further sentence. Generally speaking, once a court has passed a sentence on an accused person then, the powers of that court are ended and the court has no power or jurisdiction to deal further with the case or with the convicted person. The court becomes *functus officio* except on such matters as the court is given specific legislative authority to act such as power to allow time to pay a fine or to admit a convicted person bail pending the determination of his appeal.

In this particular case it is our view that once the magistrate grade II sentenced the appellant to a term of imprisonment that he became *functus officio* and no longer had the power to commit him to the Chief Magistrate for a further sentence, even if that sentence was to be a term of preventive detention.

It is necessary, however, further to examine the question of an order for preventive detention and more fully to consider the powers of the Chief Magistrate

to order detention in this case. Preventive detention is provided for by the Habitual Criminals (Preventive Detention) Act, (Cap. 112). The relative provisions applicable to this case are contained in s. 2 of the Act and read as follows:

“2(1) When a person who in the opinion of the court is not less than thirty years of age –

- (a) is convicted of an offence punishable with imprisonment for a term of two years or more;
- (b) has been convicted on at least three previous occasions since reaching, in the opinion of the court, the age of sixteen years, of offence punishable with such a sentence, and was on at least two of those occasions sentenced to imprisonment,

then, if the court is satisfied that it is expedient for the protection of the public that he should be detained in custody for a substantial time the court may pass on him, in addition to or in lieu of any other sentence, a sentence of preventive detention for such term of not less than five nor more than fourteen years as the court may determine.”

It is clear from this section that any order for preventive detention is a sentence and further that it has to be given by the court passing the original sentence on the case. We refer to the words:

“the court may pass on him, in addition to or in lieu of any other sentence, a sentence of preventive detention.”

The power here is to either add to the ordinary sentence, or to give the period of preventive detention in lieu of such sentence. We are of the view that a court can only act under s. 2 if it is the court dealing with the sentence for the particular offence, and that if an accused has already been sentenced by a court on a particular charge then no other court has jurisdiction to again sentence him on that charge.

We are therefore of the view that the sentence of preventive detention ordered by the Chief Magistrate is illegal for the reasons that –

- (1) The magistrate grade II had no power to commit the appellant for sentence to the Chief Magistrate once he had already sentenced the appellant on that particular charge. The appellant was therefore wrongly committed for sentence and the Chief Magistrate had no jurisdiction to order a further sentence of preventive detention.
- (2) In any event the Chief Magistrate had no power to act under s. 2 of the Habitual Criminals (Preventive Detention) Act, once the appellant had been sentenced by another court on the particular charge.

We allow the appeal against the sentence for preventive detention and accordingly quash the Chief Magistrate’s order and set aside the sentence of seven years’ detention. We maintain the sentence of 18 months’ imprisonment imposed by the magistrate grade II.

Appeal allowed.

The appellant appeared in person.

For the respondent:

J. N. Mulenga (State Attorney)

Division: High Court of Uganda at Kampala
Date of judgment: 6 February 1970
Case Number: 455/1969 (109/70)
Before: Sheridan Ag CJ
Sourced by: LawAfrica

[1] *Factory – Building operation – Repairing electrical supply to store a building operation – Factories Act (Cap. 198), s. 6 (U.).*

[2] *Factory – Work on roof of asbestos – Failure to provide ladders, crawling board etc. – Factories Act (Cap. 198), Building operations and Works of Engineering Construction (Safety and Health) Special Rules (U.).*

[3] *Factory – Branch of statutory duty – Contributory negligence – Ignorance of workman of risk.*

[4] *Damages – Personal Injuries – Quantum – Deafness and facial paralysis.*

Editor's Summary

The plaintiff was an electrician employed by the defendant. He was instructed by his foreman to repair a lighting failure in a store. He was left to do the job himself and that he found that the failure was in a bracket above the roof which was of corrugated iron and asbestos sheets and which was over ten feet above the ground. He was given no warning about the state of the roof. He took a ladder onto the roof, repaired the fault and, on returning, fell through the asbestos part of the roof sustaining injuries. The injuries consisted of deafness in the left ear, paralysis of the left side of the face preventing blinking and a comminuted fracture of the left knee cap.

The plaintiff alleged that the defendant was negligent and that it was in breach of its statutory duty to provide aids under the regulations made under the Factories Act (which regulations are set out in the judgment). The defendant denied negligence and denied that the regulations applied as the plaintiff was not engaged on a building operation, and that he was contributorily negligent.

Held –

- (i) the plaintiff was engaged on a repair to the store and this was therefore a building operation (*Price v. Claudgen Ltd.* (3) distinguished);
- (ii) the defendant was in breach of its obligation to provide aids to the operation and were negligent;
- (iii) the plaintiff did not know that what he was doing was unsafe and so he was not contributorily negligent;
- (iv) the plaintiff would be awarded damages of Shs. 50,000/00.

Judgment for the plaintiff.

Cases referred to in judgment:

- (1) *Russell v. Goode – Kemp & Kemp*, Quantum of Damages (3rd Edn.), Vol. 1, p. 373.

(2) *Ginty v. Belmont Building Supplies Ltd. and another*, [1959] 1 All E.R. 414.

(3) *Price v. Claudgen Ltd.*, [1967] 1 All E.R. 695.

Judgment

Sheridan Ag CJ: The plaintiff claims general damages against the defendants based on breach of statutory duty and negligence.

He is an electrician working for the defendants at their smelter works at

Jinja. His total monthly emoluments amounted to Shs. 700/-. He is about 39. He states that he started to learn to be an electrician in 1950 at Nakuru Radio Company, in Kenya. I am not aware that he has any recognised qualification. He has been working for the defendants for five years.

On 29 November 1968, Bhurabhai Godhanian, the defendant's foreman electrician, instructed the plaintiff to repair a lighting failure in a store. This store is made of corrugated iron sheets except for the flat part of the roof which consists of asbestos sheets. The roof overhangs for about two feet. On the top of the raised part of the roof there is a bracket holding an insulator with a wire attached leading to the main supply. This insulator feeds the light into the store. Having satisfied himself that the failure was due to a short circuit by the wire, the plaintiff fetched a ten foot long ladder and used it to climb onto the flat part of the roof, which he crossed to mend the wire. It is conceded that this ladder would not have enabled him to climb direct to the insulator which is eighteen feet from the ground. A bone of contention is whether there was a longer ladder available at the time. The plaintiff denies that there was. He says that even if there had been he would still have had to climb on to the roof to effect the repairs. He further says that since the accident the defendants have bought a longer ladder. Godhanian does not seem to dispute this. Although he says there was a ladder twenty to twenty-two feet long, he agrees that another ladder was bought in 1969 when the original ladder was sent to the mechanical section. The reason for this is not given. I am inclined to believe the plaintiff about the availability of ladders. As he was returning to the ladder, walking along the edge of the asbestos part of the roof, it gave way and he fell sustaining serious injuries.

The basis of the claim is set out in paras. 6 and 7 of the plaint as follows:

- "6. The said injuries and loss and damage were occasioned to the plaintiff by reason of a breach on the part of the defendants, their servant and/or agents of their statutory duties under Building Operations and Works of Engineering Construction (Safety & Health) Rules made under Factories Act.

PARTICULARS:

- (a) Failed to take effective measures to prevent the plaintiff falling (sic) through the roof.
- 7. Further or in the alternative, the said injuries and loss and damage were occasioned to the plaintiff by reason of the negligence and/or breach of duty and/or breach of the said contract of employment on the part of the defendants, their servants and/or agents:
 - (a) Failing to take any or any adequate precautions for the safety of the plaintiff while he was engaged upon the said work.
 - (b) Exposing the plaintiff to a risk of damage of injury of which the defendants knew or ought to have known.
 - (c) Failing to provide or maintain adequate or suitable ladders, duck ladders or crawling boards, to enable the said work to be carried out safely.
 - (d) Failing to provide or maintain a safe or proper system of work."

In support of his claim the plaintiff states that there was no warning notice on the store against going on the roof. He was not issued with any safety belt. He had done jobs like this before but not on this particular store. He did not consider that the job required supervision. Godhanian just left him to get on with it. The plaintiff did not know that part of the roof was composed of asbestos as it had all been painted an aluminium colour.

Inderjit Singh, a building contractor, stated that it would not be dangerous to walk on a roof of asbestos sheets provided that they were properly laid. Men fixing the sheets would have to do so, but then they might have had safety belts. In Mr. Singh's opinion properly tested asbestos sheets are as good as corrugated iron sheets as roofing material. I wonder if this is really so. He could only speculate as to how this asbestos sheet gave way. There was probably some latent defect.

Godhania, who admitted that he was in overall charge of work to be done, described this as a simple job not calling for supervision. If he had done the job himself he would have gone with a man to help him e.g. to hold the ladder and to pass him up tools. In answer to a question by the court, he said that he gave the plaintiff a man to help him. This was never suggested to the plaintiff in cross-examination. No such man has been called as a witness. Godhania would have climbed straight to the insulator and done the job without climbing on the roof. This may well have been possible but in the absence of any warning or prohibition, it may not have been unreasonable for another, and less experienced electrician to tackle the job from the roof. Godhania, on behalf of the defendants, was responsible for the job and if he had envisaged any danger from the plaintiff climbing on the roof he should have warned him against it.

To deal with the breach of statutory duty, under s. 55 of the Factories Act (Cap. 198) the Minister makes rules in connection with the lighting of factories, which under s. 5 would include this store. Under s. 60 of the Act he may make special rules in regard to health, safety and welfare in respect of certain classes of premises, operations and works. By virtue of these provisions the Building Operations and Works of Engineering Construction (Safety and Health) Special Rules were made (S.I. 198 No. 17). Rule 22 provides:

- “22(1) When work is done on the outside of any roof which has a pitch of more than thirty-four degrees or is slippery –
- (a) sufficient and suitable crawling ladders or crawling boards, which shall be secured as soon as practicable, shall be provided and used; and
 - (b) arrangements shall be made to prevent any person employed on the roof from falling more than six feet six inches from the edge of the roof.
- (2) When workmen work or pass on, over or near any roof covering or ceiling of glass or asbestos cement or of other fragile materials through which a person may fall more than ten feet –
- (a) suitable and sufficient ladders, duck ladders or crawling boards which shall be securely supported shall be provided and used; or
 - (b) such other effective measures shall be taken as will prevent the fall of persons through any such roof covering or ceiling.”

Mr. Keeble, for the defendants, submits that the Rules do not apply as this was not a “building operation”. In s. 6 of the Act, the following meaning is attached to these words “the construction, structural alteration, repair or maintenance of a building. . . .” He relies on *Price v. Claudgen Ltd.*, [1967] 1 All E.R. 695 where on the face of it the facts are similar. The head note reads:

“The appellant, an electrician, was on the roof of a cinema, leaning over the edge and joining electric wires of a neon lighting installation, which was on the face of the building, in order to remedy a defect. The installation consisted of neon tubes outlining the features of the outside of the front of the cinema. The installation had been fixed and was maintained by the

appellant's employers; it was held in place by clamps attached to pins driven into the masonry. The current was suddenly switched on from inside the building. The appellant received a shock, fell off the roof and was injured. On appeal in an action by him against his employers for alleged breach of duty under reg. 24 of the Building (Safety, Health and Welfare) Regulations, 1948.

HELD: the operation on which the appellant was engaged was not repair or maintenance of a building within reg. 2 (1) of the regulations of 1948, since the neon installation was not part of the building but was something that was on the building; accordingly the regulations did not apply and no breach of statutory duty was established.

Appeal dismissed."

At p. 698 Lord Morris of Borth-y-Gest said this:

"If the question is posed whether the appellant was engaged in the operation of repairing a building, I think that the immediate answer would be in the negative. He was engaged in the operation of repairing the neon installation. He was repairing something which was on a building. If someone replaces a burnt-out wire or mends a break in a wire in a neon installation on a building, it does not seem to me that it can reasonably be said that he is repairing a building. Both before and after such operation of replacement or repair the building will be the same: neither its structure nor its condition will be affected. Indeed, if such an installation were removed, the building as a building would (apart from any special facts and circumstances) be unaffected."

I would distinguish the present case where the insulator feeds the light to the store. It is a fixture on the building and so part of it. In *Price's* case the neon installation had a switch separate from the cinema. It was separately owned. The appellant ignored standing instructions and took a chance that the current would not be switched on. There was a high degree of contributory negligence. Here this was a work of repair and maintenance to the store and so comes under the Rules.

Paragraph 5 of the written statement of defence states:

"5. The Defendant will say that the Plaintiff was negligent and was the author of his own harm.

PARTICULARS

- (a) The Plaintiff was negligent in not providing himself with a ladder of sufficient length to gain direct access to the insulator.
- (b) The Plaintiff was negligent in walking across the roof as he did when it should have been obvious to him that it was dangerous to do so."

While it is true that the plaintiff should not do something likely to endanger himself, *Ginty v. Belmont Building Supplies Ltd. & another*, [1959] 1 All E.R. 414, I am unable to see that he was in breach of any duty. He did not know that it might be unsafe to go on the roof without a safety belt. Gondhania never warned him that it might be.

There is no evidence that the roof had a pitch of more than thirty-four degrees or was slippery so that sub-r. (1) of r. 22 of the rules would not apply. But under sub-r. (2) the plaintiff was working or passing over or near a roof covering of asbestos cement through which he might fall more than ten feet so that the defendants were under a duty to provide:

- (a) suitable and sufficient ladders, duck ladders or crawling boards which were securely supported; or
- (b) such other effective measures as would prevent the fall of the plaintiff through any such roof covering or ceiling.

In my view the defendants were in breach of their statutory duty and were negligent as pleaded in the plaint.

As to damages the plaintiff was admitted to Jinja Hospital where he was examined by Dr. Mutesasira who found a swelling on the right side of the face, bleeding from the left ear and a comminuted fracture of the left knee cap. After eleven days the plaintiff was sent to Mulago Hospital as he was complaining that he was unable to see through his left eye or hear through his left ear. He was in great pain during his stay in hospital. On 5 May 1969, Mr. Ssali, a specialist consultant, ear, nose and throat at Mulago, examined him. He found paralysis of the left side of the face preventing the plaintiff from blinking his left eye. The eye waters if he eats or chews, the nerve damage causing water to go to the eye instead of to the saliva gland. This causes embarrassment in eating. Apart from disfigurement, non-blinking can cause damage to the eye from exposure. The plaintiff is permanently deaf in the left ear. On 21 July 1969, this diagnosis was confirmed by Mr. Bewes a consultant surgeon – also the fractured knee cap with the likelihood of osteoarthritis developing.

Mr. Singh, for the plaintiff, referred to *Russell v. Goode*, Kemp and Kemp, The Quantum of Damages (3rd Edn.) Vol. I, p. 373 where in 1954 an advertising representative aged 56 who had been concussed with head injuries and injury to the left ear resulting in partial deafness, was awarded £2,500. Mr. Keeble, very fairly suggests Shs. 45,000/- as appropriate damages. I think that for a person of the plaintiff's standing in Uganda they should be slightly more.

There will be judgment for the plaintiff for Shs. 50,000/- with interest and costs.

Judgment for the plaintiff.

For the plaintiff:

S. P. Singh (instructed by *Dalal & Singh*, Kampala)

For the defendant:

O. J. Keeble (instructed by *Hunter & Greig*, Kampala)

Kabeni v Republic
[1970] 1 EA 503 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	8 April 1970
Case Number:	189/1970 (116/70)
Before:	Trevelyan J
Sourced by:	LawAfrica

[1] *Criminal Law – Attempted suicide – Not a serious offence.*

[2] *Criminal Practice and Procedure – Sentence – Attempted suicide – Probation Officer’s report required before sentence.*

Editor’s Summary

A sentence of six months’ imprisonment for attempted suicide is not an appropriate sentence and the accused requires sympathy rather than punishment. A probation officer’s report should be obtained as a matter of course.

Appeal allowed.

No cases referred to in judgment.

Judgment

Trevelyan J: The appellant pleaded guilty to a charge of attempted suicide and was sentenced to six months’ imprisonment. After her plea the prosecution told the trial magistrate no facts to assist in the assessment of a proper sentence but said that “committing suicide is very serious”. With respect the offence is only a misdemeanour, there was no need for the prosecutor’s comment because a magistrate is expected to know whether an offence is or is not serious and, as an offence, attempted suicide is more aptly described as pathetic than anything else.

In her plea and also in her mitigation the appellant said that she tried to kill herself because of continual harassment by the police. This may or may not be true but it was not simply for ignoring as the magistrate did ignore it. All the magistrate said was:

“It is a very serious offence to try to kill oneself. I take this offence to be very serious. Accused sentenced to six months’ imprisonment.”

It would have been far better had the magistrate realised that an accused such as the appellant in this case needs sympathy and help rather than punishment. What useful purpose can a period of six month’s imprisonment serve in circumstances such as we have here? A probation officer’s report should be obtained as a matter of course before a person convicted of such an offence is dealt with. The appeal is allowed. As the appellant has now been in custody for almost two months, however, I shall not call for a report but will reduce her sentence to enable her to be released from custody forthwith.

Appeal allowed.

The appellant was absent and unrepresented.

For the respondent:

K. Muttu (State Counsel)

Division: Court of Appeal at Kampala
Date of judgment: 16 April 1970
Case Number: 41/1969 (87/70)
Before: Duffus P, Spry VP and Law JA
Sourced by: LawAfrica
Appeal from: The High Court of Uganda – Mukasa, Ag. J.

[1] *Costs – Customs and Excise – Costs awarded against Commissioner General – Ordinary principles applied – ss. 165 and 171 of East African Customs and Transfer Tax Management Act, 1952 – s. 171 only applies to protect individual officers who have acted on reasonable grounds.*

[2] *Customs and Excise – Forfeiture of uncustomed goods – Importation for use of Embassy – Vehicle lawfully imported duty free when imported for Embassy – Ownership irrelevant – Vehicle wrongly seized – East African Customs and Transfer Tax Management Act, 1952, s. 165 (1); Customs Tariff Act, 1968 s. 1 (4) and Sched. 3 Part A, Item 5 (1) (U.).*

[3] *Statute – Construction – Heading – Construed as part of section but regarded only as draftsman’s opinion of meaning of section.*

Editor’s Summary

The Sudanese Embassy in Uganda entered into an agreement to purchase a car from the appellant. The appellants as importers cleared the car through Customs free of duty as a car “for the official use of the Sudanese Embassy” and kept it on their premises for some three months pending payment. It was never paid for, and was seized by the Customs as uncustomed goods. The appellants sued for the return of the car but their suit was dismissed, the judge holding that the seizure of the car was lawful because under the terms of the agreement for sale the appellants were still owners of the car, it not having been paid for. The appellant appealed.

Held –

- (i) the heading to Part A of Sched. 3 of the Customs Tariff Act, 1968 of Uganda must be construed as part of the section but only restates in abbreviated form the draftsman’s opinion of the meaning of s. 1 (4) of that Act and does not impose a “condition” within that subsection;
- (ii) the only condition on the importation of goods under item 5 in that Schedule is that the goods imported are for the use of a foreign Embassy, and the car was so imported. Ownership was irrelevant;
- (iii) the retention of the car for the purpose of eventual delivery to the Embassy was lawful;
- (iv) the seizure of the car was unlawful;
- (v) only individual customs officers who have acted reasonably are protected by s. 171 of the East African Customs and Transfer Tax Management Act;
- (vi) costs should be awarded against the Commissioner-General (dicta in *Commissioner of Customs v.*

Shah (1) approved).

Appeal allowed.

Judgment of the High Court [1969] E.A. 664 overruled.

Case referred to in judgment:

(1) *Commissioner of Customs and Excise v. Shah Karamshi Panachand & Co.*, [1961] E.A. 303.

Judgment

The following considered judgments were read: **Duffus P:** The appellant, a limited liability company who import and sell Mercedes Benz motor cars in Uganda, brought this action against the respondent the Commissioner-General of Customs and Excise in East Africa by virtue of s. 165 (1) of East African Customs and Transfer Tax Management Act, 1952.

The action is based on the seizure of a Mercedes Benz motor car then in the custody of the appellant on the ground that it was uncustomed goods. The appellant claims that the motor car was imported free of duty for use of the Sudanese Embassy under the provisions of s. 1 (4) of the Customs Tariff Act, 1968, and was in its possession as agent for the Sudanese Ambassador in Uganda.

The relevant facts are not in dispute. On 25 June 1968 the Sudanese Embassy entered into an agreement to purchase a Mercedes Benz 220 Saloon motor car from the appellant company. Two agreed facts that emerge here are that the Sudanese Embassy are a foreign Embassy within the meaning of Sched. 3 of the Customs Tariff Act, 1968, and secondly that at all relevant times this transaction remained as an agreement for sale, the vendors, the appellant company, keeping the car pending payment. On the date of the contract the appellant company had a suitable car in transit from Germany, and apparently at some time before its arrival in Uganda, appropriated that car in fulfilment of its agreement with the Sudanese Embassy. The vehicle arrived at Mombasa on 8 July and in bond at Kampala on 7 August 1968.

The appellants as the importers cleared this vehicle through Customs on that date free of duty as being a motor car imported “for the official use of Sudanese Embassy”. The actual clearance of the motor car through customs appears to have been done by the appellant’s agents The African Clearing and Forwarding Company Limited but there has never been any question here but that the importation and clearance through customs was done by the appellant company. Evidence as to the clearance was given by the appellant company’s Sales Manager, a Mr. Vasani, but the best evidence as to what happened is the actual “clearance form” itself. This shows that the motor car was imported by D. T. Dobie (Uganda) Ltd., the appellant company, and gives full particulars and identification marks of the car. The document also bears a signature of someone from the Sudanese Embassy with the official seal of that Embassy, and has a certificate at the bottom reading “Certified that this car is for the official use of the Sudan Embassy”.

The customs authority accepted this certificate and cleared the car through the customs free of duty. In his address to us the learned advocate for the respondent Mr. Khaminwa suggested that the appellant company had committed some sort of misrepresentation in clearing this car through customs but as the court pointed out, and I understood Mr. Khaminwa to agree, there was not the slightest evidence on record of any misrepresentation on the part of the appellant company, indeed throughout this transaction there has never been any evidence or suggestion of malpractice on the part of the appellant company, and the decision in this case rests solely on a question of law.

The car having been cleared through customs was then taken away by the appellant company. This was on 7 August 1968. The evidence shows that the car was then prepared and made ready for delivery but the Sudanese Embassy had not paid the purchase money and the car was kept by the appellant company pending payment. There is no suggestion that the appellant company made any attempt otherwise to dispose of or use the car, and it must be accepted as a fact

that the appellant company kept the car in its custody in accordance with the agreement for sale awaiting payment by the Sudanese Embassy before delivery.

At the trial various issues were framed but with respect a number of these issues are not really relevant. The fourth agreed issue, however, states what is the crux of the case and that is – “Was the seizure of the motor car legal and its detention lawful or not?” and the answer to this question depends on two other issues –

- (a) was the importation of the car and the clearance through Customs free of duty lawful? and
- (b) was its subsequent retention by the appellant company pending payment by the Sudanese Embassy a lawful act?

The legality of the importation of the car depends on the interpretation to be placed on s. 1 (4) of the Customs Tariff Act, 1968. Section 1 is the section providing for import duties in Uganda and sub-s. (4) states, *inter alia*.

“(4) Notwithstanding the provisions of subsection (1) of this section,

- (a) no import duty or suspended duty shall be charged on the goods listed in Part A of Schedule 3 to this Act when imported, or purchased before clearance through the customs, for the use of one of the persons named in that Part in accordance with any condition attached thereto as set out in that Part;”.

Mr. Wilkinson, the advocate for the appellant company, submitted that this section meant exactly what it said and that the facts in this case show that the motor car was legally imported for the use of the Sudanese Embassy, a foreign Embassy within the meaning of Part A of Sched. 3 of the Act.

Mr. Khaminwa for the respondents on the other hand submitted that s. 1 (4) must be read with Part A of Sched. 3 and this showed that one of the conditions of the importation was that these goods had to be imported by the Embassy itself, or purchased by the Embassy before clearance.

The relevant portion of Sched. 3 reads as follows:

“s. 1 (4)
SCHEDULE 3
EXEMPTIONS FROM DUTY
PART A

Goods imported or purchased before clearance through the Customs by Governments, Public Bodies, Privileged Persons and Institutions.

1. The President

Goods for use by the President.

.....

5. Diplomatic Privileges

- (1) Goods for the official use of the United Nations or its specialised Agencies or any Commonwealth High Commission or of any foreign Embassy, Consulate or Diplomatic Mission.”

The meaning of s. 1 (4) appears clear and as applied to this case is that no import duty shall be charged on the goods listed in Part A of Sched. 3 when imported for the use of a foreign Embassy in accordance with any condition attached to such importation as set out in that part of the Schedule.

No question arises here of the motor car having been purchased before clearance through customs.

The real question is whether the car was imported for the use of the Sudanese Embassy within the meaning of the law. The section requires that the importation must be in accordance with any of the conditions

that are attached to such importation by the Schedule. Mr. Khaminwa's submission is that, reading s. 1 (4) and Part A of Sched. C together, goods, to qualify for exemption from duty, must either be imported directly by the Embassy for its use or must have been bought by the Embassy before clearance. He relies on the words which form the subheading under Part A which I have already quoted reading "goods imported or purchased before clearance through the Customs by Governments . . .".

He agrees that the actual importation can be carried out by an agent on behalf of the Embassy if it is in fact done for the Embassy but here he contends and, in my view correctly, that the importation in this case was in fact done by the appellant company. Admittedly the motor car was intended for the official use of the Sudanese Embassy but the importation was also for the benefit of the appellant company as in doing so it was effecting the sale of a motor car. He submitted that it was not a case here of the appellant company importing the car as an agent for the Sudanese Embassy.

This interpretation of the section gives a restricted meaning and the question is whether the law does not allow the importation of an article free of duty when it is in fact imported for the use of the privileged person.

I would refer again to the Schedule. The first point is that the words which I have already quoted appearing immediately under Part A are in fact a heading for the 17 classes of persons there set out. I agree that as a heading it must be construed as a part of the section but in fact these words appear to be only re-stating in abbreviated form the draftsman's opinion of the meaning of s. 1 (4) as applied to the 17 classes of persons or institutions that then follow.

This heading does not in fact impose any of the "conditions attached thereto" as mentioned in the section. A reference to the body of Part A shows all the various conditions as attached to each of the 17 classes therein set out. For example in number 1 the condition is that the goods are for use by the President, in item 4 (2) the goods are for the use of any of the armed forces of any allied power, while in item No. 7 the machinery has to form part of the terms of a specific contract, whilst in item Nos. 10, 11 and 12 the importation is subject to such limitations and conditions as the Commissioner-General may impose, while in item No. 13 the condition is that the goods are for the use in the conduct of religious services.

In this particular case item No. 5 "Diplomatic Privileges" the condition is that the goods imported are for the official use of a foreign Embassy. This is in my view the only condition that is attached to the importation of this motor car and this was in fact the condition on which it was imported.

I would note here that Sched. 1 of the Finance Act of 1969 has amended this sub-heading by adding after the word "Institutions" a proviso stating

"provided said goods are not disposed of in Uganda within two years of the date of importation or purchase".

This proviso does not, however, create a condition that affects the actual importation, it is rather a condition attached to the goods after they have been imported, and in any event it is an amendment that arose after the importation and seizure in this case.

The importation in this case was in my view properly and legally done and the customs authorities were correct in the circumstances of this case in admitting this motor car in free of duty. Before proceeding to the second question as to whether any action by the appellant company subsequent to importation justifies the seizure of the car, I would make a few general observations.

It appears to me clear that s. 1 (4) was purposely drafted in very wide terms

and if the customs authorities are satisfied that the goods are being imported for the use of a foreign Embassy they have authority, as in this case, to allow these goods to be imported free of duty although the importation was in fact not done by the Embassy. The law provides severe penalties if the goods are used otherwise than for the purpose of their importation, and s. 103 of the East African Customs and Transfer Tax Management Act provides for the payment of duty in cases where the goods are subsequently disposed of in any manner inconsistent with the purpose for which they were imported.

The question then arises as to whether the appellant company during its subsequent retention of the car did any act that would justify its seizure. The evidence shows that the appellant company kept the car for nearly three months and had it stored in its show room. Unquestionably there was a prolonged retention of the car but it does appear that the longer the appellant company kept the car the greater its own loss, as in fact the company was being deprived of the value of the car and had the car in its possession which it could not use for any purpose. In my view the mere fact that they the appellant company retained the car until it was paid for, would not of itself make the company liable to pay customs duty so long as the retention of the car was solely for the purpose of eventual delivery to the Sudanese Embassy.

The appellant company kept the car in its show room but there has been no suggestion that this was an improper user. The evidence is that it was marked "sold" and that it was kept in the show room for safe custody. I am therefore satisfied that the importation of this car free of duty was legally and properly carried out and that the subsequent retention by the appellant company pending payment was a lawful act and that the seizure of the car on 20 October 1968 was improper and illegal.

Mr. Khaminwa referred us to the provisions of s. 171 (3) of the East African Customs and Transfer Tax Management Act, 1952 and asked that no costs be awarded against the Commissioner-General. We did not have the benefit of very full arguments on this point, but we have considered his submission.

I would refer here to the decision of this Court in the case of the *Commissioner of Customs and Excise v. Shah Karamshi Panachand & Co.*, [1961] E.A. 303 and to the judgments of Forbes, V.-P., and Corrie, J. A. This question was argued before the Court and both these learned judges gave it as their definite opinion, admittedly as an obiter dictum, that the provisions of s. 171 (3) of the Act did not apply to proceedings brought against the Commissioner-General of Customs and Excise in his representative capacity. In their view the relevant provision as to costs was to be found in sub-s. (2) of s. 165.

After full consideration I agree with these views. It does appear that sub-s. (3) of s. 171 applies to proceedings brought against an officer in his personal capacity on account of an act done by such officer, and does not apply to an action brought against the Commissioner-General in his representative capacity by virtue of s. 165 of the Act.

I would therefore allow this appeal. I would set aside the judgment of the High Court and enter judgment for the appellant company and order the return of the motor car if substantially in the same condition as when it was seized or in the alternative its value as on the date of its seizure and in the event of its value being payable then interest at the rate of 6 per cent on the value as from the date the plaint was filed. Value here means the amount that the Sudanese Embassy would have had to pay for the purchase of the car under the contract.

Evidence was given that this value was Shs. 50,500/- but it is conceded that this is not the correct value as this figure includes an amount for import duty and sales tax that was not paid. If it is necessary for the value to be paid and the

parties are unable to agree on this figure then there will be liberty to apply to a judge of the High Court to hear evidence and fix the amount to be paid for the value of the car. I would further order that the appellant company have the costs in the High Court and on this appeal.

As the other members of the Court agree it is so ordered.

Law JA: On 25 June 1968, the Sudanese Embassy in Kampala entered into a written agreement to buy a Mercedes motor car from D. T. Dobie & Co. (Uganda) Ltd. A suitable car was already in transit from Germany, it arrived in Kampala on 7 August and was cleared from the bonded warehouse on the same day, free of duty, as being “for official use of the Sudan Embassy”. The car was taken to the appellant’s premises to be prepared for delivery to the Embassy. Unfortunately the Embassy’s fund, from which the purchase price was to be paid, expired at the end of the financial year in June, and the Embassy was awaiting the allocation of fresh funds. In the meantime, the appellant kept the car on its premises ready to be handed over on receipt of the purchase price. On the car was a notice with the word “sold”, and there is no suggestion that the appellant made any attempt to dispose of or use the car in any way whatsoever. On 20 October 1968, the car was seized from the appellant’s show-rooms as being uncustomed. The appellant sued the respondent in the High Court for the return of the car and damages, but the learned trial judge dismissed the suit, holding that as the Sudanese Government had not imported the car directly, or bought it before clearance, it represented “uncustomed goods” and was therefore properly seized. The appellant’s case, as expounded before us by Mr. Wilkinson, is that the car was bona fide imported by the appellant for the use of the Sudan Embassy and was accordingly properly cleared from bond – free of duty, and the user not having been changed, the subsequent seizure of the car was unlawful. Mr. Wilkinson relied on s. 1 (4) of the Customs Tariff Act, 1968, of Uganda, which so far as material reads as follows

“No import duty or suspended duty shall be charged on the goods listed in Part A of Schedule 3 to this Act when imported, or purchased before clearance through the customs, for the use of one of the persons named in that Part in accordance with any condition attached thereto as set out in that Part”

An Embassy is a “person” for the purposes of the sub-section quoted above, by para. 5 (1) of Part A of Sched. 3, which exempts from duty “goods for the official use of . . . any . . . foreign Embassy, Consulate or Diplomatic Mission”.

Mr. Khaminwa for the respondent submitted that the sub-section must be read together with Part A of Schedule 3 in order to ascertain its true meaning, and he referred us to the heading of the section, which reads –

“Goods imported or purchased before clearance through the Customs by Governments, Public Bodies, Privileged Persons and Institutions.”

He submitted that this heading was one of the “conditions” referred to in the sub-section, and that as the car was not imported by the Embassy, nor purchased before clearance, it was unlawfully imported and thus liable to seizure as uncustomed goods. When asked why the customs allowed the car to be imported duty free on the strength of a certificate that the car was for the official use of the Sudan Embassy, Mr. Khaminwa replied that the officer concerned must have been misled into thinking that the car had been bought by the Embassy. There is no reason to believe that this is so. The officer concerned was not called as a witness, and there is evidence on record that cars intended for use by Government or Embassies are often paid for after they have been

cleared duty free through the customs. However, if this practice is contrary to law, it would not avail the appellant in this case.

The answer to this appeal depends entirely on the interpretation of a statute. Leaving aside the Schedule for a moment, it is clear from s. 1 (4) of the Act that, the car having been imported for the use of an Embassy, it was properly cleared duty free. Is there any condition in the Schedule which alters the position? I am unable to agree with Mr. Khaminwa that the heading to Part A of Sched. 3 is a condition. It is merely a condensation or summary of s. 1 (4) of the Act, and an inaccurate summary at that. The conditions referred to in the sub-section are the conditions attaching to the various items in Part A, for instance in the case of uniforms (item 6) they must be as required by the regulations of the service; and the robes and wigs of judges are admitted duty free on condition that the person concerned is a barrister-at-law. There is no condition in the item relating to Embassies (item 5 (1)) requiring goods to have been paid for before clearance; it is sufficient if they are "for the official use" of the Embassy. I have no doubt that the car, the subject of this appeal was properly cleared duty free as being for the official use of the Sudan Embassy; that it was retained by the appellant for that use exclusively, pending payment, and was not put to any other use; and that its seizure by the customs was wrongful. I would allow this appeal and I concur in the order proposed by the learned President.

As regards costs, Mr. Khaminwa has urged that as the officer who seized the car acted in good faith, costs should not be ordered against the respondent, and he has invoked s. 171 of the East African Customs Management Act, 1952. That section is designed, in my view, to protect individual officers who have acted on reasonable grounds. The section which applies to a case such as the one under consideration, where the Commissioner-General is being sued in a representative capacity, is s. 165. By sub-s. (2) of that section, costs may be awarded to or against the Commissioner-General. I can see no reason for departing from ordinary principles in this case. Even assuming that the officer concerned had reasonable grounds for seizing the car, the appellants bona fides are not open to challenge, and the appellant was obliged to have recourse to the courts in order to regain possession of its car. I would give the appellant its costs in this court and in the High Court.

Spry VP: I also agree.

Appeal allowed.

For the appellant:

P. J. Wilkinson, Q.C., E.S. Kirenga and J. W. R. Kazzora (instructed by Kazzora & Co., Kampala)

For the respondent:

J. M. Khaminwa (Principal Assistant Legal Secretary)

Income Tax v Ngaremtoni Estate Ltd
[1970] 1 EA 511 (CAD)

Division:	Court of Appeal at Dar Es Salaam
Date of judgment:	24 January 1970
Case Number:	43/1969 (38/70)

Before: Sir Charles Newbold P, Duffus VP and Spry JA
Sourced by: LawAfrica
Appeal from: The High Court of Tanzania – Platt, J.

[1] Income Tax – Burden of Proof – On taxpayer objecting to assessment – Not discharged by production of false accounts.

Editor’s Summary

A group of purchasers bought an estate from a group of vendors. Subsequently the taxpayer company was formed to purchase, and did purchase, the estate. It later submitted a return of income which showed income of £40,000 and expenditure of £13,250. These accounts were clearly incorrect because they purported to relate in part to a period before the incorporation of the taxpayer. The Commissioner-General assessed the taxpayer to tax on the income shown in these accounts but refused to allow the expenditure as a deduction. The taxpayer having appealed successfully to the High Court against this assessment, the Commissioner-General appealed to the Court of Appeal; and the taxpayer cross-appealed arguing that the £40,000 was not its income.

Held –

- (i) the taxpayer had failed to discharge the onus upon it of proving that the assessment was excessive and of proving that the expenditure had been incurred by it;
- (ii) a taxpayer cannot discharge that onus by producing false accounts. (*Karia v. Shah* (1) applied).

Appeal allowed. Cross-appeal dismissed.

Case referred to in judgment:

(1) *Karia v. Shah*, [1962] E.A. 43.

Judgment

The following considered judgments were read. **Sir Charles Newbold P:** This was an appeal by the Commissioner-General of Income Tax and a cross-appeal by a taxpayer from a decision of the High Court varying an assessment of income tax for the year of income 1965 raised on the taxpayer.

By an agreement for sale dated 19 August 1964, a group of persons (hereinafter referred to as the purchasers) agreed to purchase from another group of persons (hereinafter referred to as the vendors) an estate, together with the movables thereon, for a total sum of £60,000. The purchase price in the agreement was said to be apportioned as follows: £43,600 for the land, developments, buildings, piping and all other fixed assets; £3,150 for the machinery, vehicles, furniture and all other movables; and £13,250 for agreed expenses incurred by the vendors as from the 1 May 1964. It was agreed that the purchase price would be paid as to £2,000 on or before 25 August 1964, and as to £18,000 on or before

September 1964. As far as is known these sums were paid by the purchasers. The balance of £40,000 was agreed to be paid to the vendors by their receiving directly the proceeds of the crop; and it was also agreed that if those proceeds fetched either more or less than the vendors would correspondingly gain or lose. It was a specific term of the agreement that all farm operations from 1 May 1964, which was stated to be the date of the purchase, would be for the account of the purchasers and that for the purposes of income tax the farm operations from that date were the business of the purchasers.

The taxpayer company was incorporated on 21 September 1964, and one of its objects was to purchase the estate. On an unknown date in September 1964, but which must have been after the 21st, the vendors, in consideration of the receipt of £43,600, transferred the estate to the taxpayer. The evidence of one of the purchasers, who was also a director of the taxpayer company, was that by 21 September 1964, all the crops had been removed from the estate and that the estate was transferred directly from the vendors to the taxpayer. The evidence dealing with how or from whom the taxpayer acquired the estate is non-existent and the evidence as to the facts of the income and expenditure of the taxpayer for its first accounting period, which was the year of income 1965, was meagre in the extreme. It appears, however, that at some stage the taxpayer presented to the Commissioner-General, with other accounts, an income and expenditure account for the period 19 August 1964 to 30 August 1965, showing considerable expenditure. The income disclosed by this account consisted almost entirely of an item of £40,000 described as "sales of produce as per agreement" less an item of £13,250 described as "expenses as per agreement". The accountant called by the taxpayer at the hearing before the High Court, who was not the accountant who had prepared the accounts submitted by the taxpayer, stated that he did not understand the accounts. I join him in that position. The accounts are quite clearly false, at least in the sense of being incorrect. The company obviously cannot have an income and expenditure account in respect of a period prior to its existence. The Commissioner-General assessed the taxpayer to tax and refused to allow as a deduction the amount of £13,250. The taxpayer appealed to the High Court claiming that that sum was an expense wholly and exclusively incurred by it in the production of its income; alternatively, that if it was not, then the sum of £40,000 was not the income of the taxpayer.

Platt, J. held that as the land was conveyed by the vendors to the taxpayer it must be assumed that the taxpayer entered into a new contract with the vendors for the purchase of the estate on the same terms as the original agreement for sale; that the taxpayer had agreed to pay the expenses of £13,250 incurred before incorporation; that these expenses were incurred in connection with the taxpayer's business before the date of commencement of such business; and that they were deductible under s. 14 (2) (f) of the East African Income Tax (Management) Act. From this decision the Commissioner-General has appealed.

As the expenses were quite clearly incurred before the incorporation of the taxpayer company and as only expenses incurred by a taxpayer are deductible, the taxpayer must first prove that he agreed to pay the expenses, quite apart from the legal effect such an agreement would have. The onus is quite clearly on the taxpayer to prove this agreement as he has to prove that the assessment is excessive. There is absolutely no evidence that the taxpayer agreed to pay these expenses – indeed, there is no evidence of what price the taxpayer agreed to pay for the estate. It is quite wrong to assume that because the vendors conveyed the estate directly to the taxpayer therefore the taxpayer had entered into a new contract with the vendors. In the first place, it is quite common where there has been a series of agreements for sale between successive purchasers over a relatively short period for the legal estate to be conveyed by the original

vendor to the final purchaser without any contract being in existence between these two parties. It is to be noted that the transfer, which states the consideration as £43,600, does not state that this sum was paid by the taxpayer; and there is, of course, no reference in the transfer to the sum of £13,250. Secondly, there was an agreement for sale between the vendors and the purchasers for the sale of the estate and there is no evidence that there has been any breach of that agreement. There could not be a new contract for the sale of the estate from the vendors to the taxpayer without a breach of the agreement for sale. It is quite wrong to imply a contract of sale between two parties when the only evidence is that the vendor had already agreed to sell the estate to another person. As no new contract has been proved between the vendors and the taxpayer and as the expenses were clearly incurred before the incorporation of the taxpayer, there is absolutely no evidence that the expenses were incurred by the taxpayer. Accordingly, the appeal of the Commissioner-General must succeed. I should wish to make it clear that this is quite irrespective of whether s. 14 (2) (f) would be applicable in any event.

I turn now to the cross-appeal, which claims that Platt, J. was wrong in holding that £40,000 was the income of the taxpayer. There can be no doubt that as the estate was sold with effect from 1 May 1964, the working expenses of the estate incurred by the vendors on behalf of the purchasers were a revenue debt owed by the purchasers to the vendors. There can equally be no doubt that the total amount received by the vendors for the crop which was produced as a result of such expenditure was income of the purchasers. This income, which was received directly by the vendors as the agent for the purchasers, was applied partly in the repayment to the vendors of the revenue debt of £13,250 and partly in payment of the balance of the capital purchase price of the estate and movables. This purchase price was obviously the figure of £46,750, as is shown quite clearly by the agreement. This figure is arrived at whether one adds the figure of £43,600, said to be the price of the land, to the figure of £3,150, said to be the price of the movables, or whether one subtracts from £40,000 the figure of £13,250, leaving a balance of £26,750 paid towards the purchase price, to which one adds the previous payments of £20,000. Whether the fluctuation in the actual income proceeds of the crop – the odds against these proceeds being exactly £40,000 are astronomical – had the effect of increasing or reducing the capital sum of £46,750 or of increasing or reducing the revenue sum of £13,250 it is unnecessary in this appeal to determine; though it would appeal to me to be related more properly to the capital figure. I am satisfied, therefore, that the hypothetical sum of £40,000 received from the sale of the crop was the income of the purchasers.

But does that mean that the cross-appeal of the taxpayer succeeds? As I have said, the accounts rendered by the taxpayer are obviously false. The figure in the income and expenditure account of £40,000, even though described as the amount received from the sale of the crop, is extremely unlikely to be the true amount of the crop proceeds. The expenditure side of that account shows expenditure of about £17,500 for the period covered by the account; but the income side of the account for the same period, apart from the figure of £40,000, shows only the derisory figure of £6 and the insignificant figure of about £680, from which is to be deducted, for some inexplicable reason, the sum of about £350. The entire account is one which obviously conveys a false picture. No evidence has been led as to what income the taxpayer has received or would be expected to receive which would justify the appreciable figure of expenditure. Instead, the taxpayer has chosen to return a figure of income which it is now submitted, on a purely contingent basis, is not its income. This may be so, but its true income may be greater; and the onus is on the taxpayer to prove that the assessment is excessive. I cannot accept that it does so by producing false

accounts. In *Karia v. Shah*, [1962] E.A. 43 I said at p. 48:

“As I understand the law, if a party to a suit founds his case upon a document which is forged in a material respect, the forgery having been committed by a person for whose acts he is responsible, then, the forgery having been discovered, he will not be allowed to succeed by disregarding the forgery and relying on other evidence. It seems to me basically wrong that the courts of justice should be used as an instrument to serve the purposes of a party whose claim is based on fraud maintained up to the last moment but which, when discovered, he asks the court to disregard and to allow him to succeed on evidence produced by the party against whom the fraud was perpetrated.”

In this case the taxpayer has, in purported compliance of its statutory duty, returned certain figures as its income and expenditure. These figures obviously convey a false picture, and in at least some respects, are false in themselves. Although the onus is on the taxpayer to show that the assessment is excessive, no attempt has been made to produce the true figures. Instead, the taxpayer, while seeking to retain the benefit of the expenditure figures, seeks to reduce the income figures on the ground that they are not correct. I see no more reason why it should be permitted to do so than if it had based a claim on forged documents, in which event it would not have been allowed to disregard the forgery and succeed on other evidence. I am not satisfied that the taxpayer has discharged the onus on it of showing that the assessment is excessive and I would dismiss the cross-appeal.

For these reasons I would allow the appeal with costs, set aside the judgment and decree of the High Court and substitute therefore a judgment and decree dismissing with costs the appeal of the taxpayer to the High Court and confirming the assessment of the Commissioner-General. I would dismiss the cross-appeal with costs. I would give a certificate for two advocates on both the appeal and cross-appeal.

As the other members of the court agree it is so ordered.

Duffus VP: I agree with the judgment of My Lord President.

Spry JA: I also agree. This is a most unsatisfactory matter, but the respondent company appears to have brought its troubles on itself, possibly through bad advice.

I agree that there is no evidence from which it would be possible to imply a contract between the vendors and the company and had there been such a contract, the director who gave evidence would surely have testified to it.

I agree also that, on the slender information available, the £40,000 shown as income and the £13,250 shown as expenditure, were income and expenditure of the purchasers, and that the former is an artificial and not an actual figure. It may be, the company's property being primarily a coffee farm, that the company received no income during the first nine months of its existence, other than the small amounts shown as received from sales of milk and produce, but the onus is on the respondent company to prove that the assessment is too high and it has failed to produce any adequate evidence of its actual income for that period.

Appeal allowed. Cross-appeal dismissed.

For the appellant:

B. C. W. Lutta (Counsel to the E. A. Community) and *R. O. Kwach* (Assistant Legal Secretary, E. A. Community)

For the respondent:

Dhanji Ramji v Rambhai & Co (Uganda) Ltd
[1970] 1 EA 515 (CAK)

Division: Court of Appeal at Kampala
Date of judgment: 25 April 1970
Case Number: 3/1970 (89/70)
Before: Duffus P, Spry VP and Law JA
Sourced by: LawAfrica
Appeal from: The High Court of Uganda – Phadke, Ag. J.

[1] *Partnership – Apparent partner – Facts showing apparent partnership must be pleaded – Partnership Act (Cap. 86), s. 40 (U.).*

[2] *Civil Practice and Procedure – Apparent partner – Facts showing apparent partnership must be pleaded – Partnership Act (Cap. 86), s. 40 (U.).*

[3] *Civil Practice and Procedure – Pleading – Judgment on unpleaded issue may stand if no prejudice caused and if issue argued.*

Editor's Summary

The respondent sued the appellant and another man as trading in the name of a firm and alleged that they were carrying on business in partnership. The appellant's defence denied that he was a partner in the firm. The trial judge found that the appellant had been introduced to the respondent as a partner in the firm and that it had not received notice of any retirement of the appellant. He therefore held that the respondent was entitled to treat the appellant as a partner in the firm. The appellant appealed, contending that liability to be treated as a partner was not pleaded, was inconsistent with the respondent's cause of action, and that the judge was not entitled to give judgment on an unpleaded issue:

Held –

- (i) the facts relied upon to make the appellant liable as an apparent partner should have been pleaded;
- (ii) such a claim could have been joined with an allegation of actual partnership;
- (iii) (by Duffus, P., and Law, J. A.; Spry, V.-P. dissenting) the appellant was prepared to meet a case of apparent partnership as most of the evidence in support of it was elicited by the appellant's cross-examination and the judge was addressed on it,
- (iv) (by Duffus, P., and Law, J. A.; Spry, V.-P. dissenting) there was no prejudice to the appellant as the unpleaded cause of action became an issue in the trial.

Appeal dismissed.

Judgment of the High Court (sub nom *Rhambhai & Co., (Uganda) Ltd. v. Lalji Ratna and another*)

[1970] E.A. 106 upheld.

Cases referred to in judgment:

- (1) *Scarf v. Jardine* (1882), 7 A.C. 345.
- (2) *Harnam Singh v. Jamal Pirbhai* (1955), 22 E.A.C.A. 1.
- (3) *Gandy v. Caspair Air Charters Ltd.* (1956), 23 E.A.C.A. 139.
- (4) *Balwant Singh v. Kipkoech Arap Serem*, [1963] E.A. 651.

The following considered judgments were read.

Judgment

Law JA: The plaint which gives rise to this appeal was filed under the summary procedure laid down by O. 33 of the Civil Procedure Rules of Uganda. The plaintiff, the respondent in this appeal, claimed the sum of Shs. 16,536.15 in respect of building materials allegedly supplied to a firm known as “Mistry Lalji Ratna and Company”.

Instead of suing the firm in the name of the firm, as provided by O. 27, the plaintiff sued two individuals, Lalji Ratna the first defendant and Dhanji Ramji the second defendant, describing them as “both trading under the name and style of Mistry Lalji Ratna and Company at Kampala”. Paragraph 2 of the plaint alleged that –

“The defendants were carrying on business in partnership under the firm name and style of Mistry Lalji Ratna and Company at Plot No. 15 Namirembe Road, Kampala, at all times relevant to this action.”

Paragraphs 3 and 4 of the plaint claimed that during the year 1967 goods were sold and delivered to the defendants at the defendants’ “special instance”, and that two cheques in part payment were drawn by the defendants which were dishonoured on presentation.

A receiving order in bankruptcy was made against the first defendant on 15 December 1967 three days after the apparent date on which the plaint was signed, but seven days before it was filed. The claim against the first defendant has been accepted by his trustee in bankruptcy the official Receiver and admitted to rank for dividend. The second defendant, however, applied for and was granted leave to defend in the suit, and his written statement of defence, so far as it is material to this appeal, reads as follows –

- “2. Defendant denies that at all material times relevant to the action he was carrying on business with Lalji Ratna as a partner in the firm name of Mistry Lalji Ratna and Company or in any other name at plot No. 15, Namirembe Road or at any other place.
3. Defendant denies that he or any person on his account received goods from the plaintiff during the year 1967 as alleged or at all. Defendant will also contend that he never had any dealings with the plaintiff in respect of the said firm.
4. Defendant denies having drawn any cheque in favour of the plaintiff as a partner of Lalji Ratna and Company or otherwise.”

There were no further pleadings. When the suit came on for hearing, the plaintiff’s advocate Mr. J. K. Patel is recorded as having opened his case as follows –

“Plaintiff’s claim is against both defendants for value of goods sold and delivered. The issue is – was the second defendant a partner in the firm of Mistry Lalji Ratna and Co. at the relevant time.”

Mr. M. C. Patel, a director of the plaintiff company was called to prove that goods were sold and delivered to the firm of Mistry Lalji Ratna and Co. and that part payment was made by two cheques, subsequently dishonoured, stamped “Mistry Lalji Ratna and Co.” and signed “L. R. Patel Director”. It is not in dispute that this signature is that of the first defendant. Mr. M. C. Patel, in the course of his evidence in chief, made only a single direct reference to the second defendant when he said “the firm had two partners, Lalji Ratna and Dhanji Ramji”, and quite clearly the plaintiff’s case, up to that stage, was based solely on a cause of action alleging actual membership of the firm by the

appellant. In cross-examination by Mr. D. N. Khanna, for the second defendant, the following matters were elicited from Mr. M. C. Patel –

1. that in May 1966 the second defendant was introduced to him by Lalji Ratna as his partner;
2. that at no time did Lalji Ratna or Lalji's son inform him that the second defendant had ceased to be a partner;
3. that it was not until November, 1967, that he was informed by his advocate of an entry in the Register of Business Names to the effect that the second defendant had ceased to be a partner in Mistry Lalji Ratna and Co. since 1 January, 1967.

Another witness called on behalf of the plaintiff was the Assistant Registrar of Business Names, who deposed that the firm of Mistry Lalji Ratna and Co. was registered on 19 May 1966, with Lalji Ratna and Dhanji Ramji as partners. On 18 November 1967, a notice of change was filed stating that as from 1 January 1967, Dhanji Ramji had retired from the firm, and the Assistant Registrar produced an agreement in writing signed by the two defendants, purporting to have been made on 7 January 1967, and providing for the retirement of the second defendant from the firm of Mistry Lalji Ratna and Co. with effect from 1 January 1967. The second defendant gave evidence and denied ever having met Mr. M. C. Patel or having been introduced to him as a partner by Lalji Ratna. He admitted that he had not caused notification of his retirement from the firm to be published in the Uganda Gazette or in a local paper. He denied that the agreement dissolving the partnership was a bogus document.

In the course of his judgment, the judge found as facts that goods to the value of Shs. 16,535.15 were sold by the plaintiff to the firm of Mistry Lalji Ratna and Co. in June, July and August 1967; that the second defendant was introduced to Mr. M. C. Patel in May 1966 by Lalji Ratna as his partner; that there were dealings between the appellant and the firm; that the second defendant's retirement from the partnership was not advertised in the Gazette or local newspaper; and that this retirement was not notified to the Registrar of Business Names until about 10 months later than the period prescribed by law, and that Mr. M. C. Patel had no actual notice of this retirement. He made no finding as to the genuineness or otherwise of the agreement of 7 January 1967, but held that in the absence of actual or constructive notice of the second defendant's retirement from the firm, the plaintiff company under s. 40 (1) of the Partnership Act (Cap. 86) was entitled to treat the second defendant as being a member of the firm at the time the goods, the subject of the plaint, were ordered by and sold and delivered to the firm, and he gave judgment against the second defendant for the amount claimed, with costs. Section 40 (1) of the Partnership Act reads as follows –

“Where a person deals with a firm after a change in its constitution he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change.”

From this judgment and the resulting decree the second defendant (to whom I shall henceforth refer to as the appellant) now appeals. The main grounds of appeal relied on by Mr. Khanna for the appellant are that it was never pleaded that, if the appellant was not a partner at the material time, he was liable to be treated as one by the application of s. 40 (1) of the Partnership Act; that such a cause of action was in any event inconsistent with the cause of action relied on in the plaint, which was based on the appellant being an actual partner at the material time; and that it was not open to the judge to decree on a case which had not been pleaded. A similar situation arose in *Gandy v. Caspair Air Charters*

Ltd. (1956), 23 E.A.C.A. 139. In that case, the trial judge had found in favour of a party on a ground that had not been pleaded. In the course of his judgment on appeal, Sir Ronald Sinclair, V.-P. said –

“The object of pleadings is, of course, to secure that both parties shall know what are the points in issue between them, so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule relief not founded on the pleadings will not be given.”

In the case now under consideration, Mr. M. C. Patel admitted that he and his advocate knew, before the plaint was filed, that the Registrar of Business Names had been notified that the appellant ceased to be a partner before the goods the subject of the plaint were ordered and supplied. That being so, I agree with Mr. Khanna that if it was sought to make the appellant liable as an apparent partner the plaint should have pleaded facts which would justify the application of s. 40 (1) of the Partnership Act, and in particular that the plaintiff (to whom I shall henceforth refer to as the respondent) knew the appellant to have been a partner in the firm before his retirement on 1 January 1967, that the respondent and the firm had dealings before that date, that after the change in the constitution of the firm the respondent supplied goods and gave credit to the firm in the belief that the appellant was still a partner, and that at such time the respondent had no notice actual or constructive that the appellant had ceased to be a partner. I do not agree with Mr. Khanna that such a cause of action could not have been included in a plaint which also pleaded a cause of action based on actual partnership, on grounds of inconsistency. A plaintiff might not know for certain whether a defendant was an actual or only an apparent partner at any particular time, and I can see no reason why both causes of action should not be pleaded as alternatives. It is however clear that none of the matters which might have brought s. 40 (1) of the Partnership Act into operation were pleaded in the plaint, or in a pleading subsequent to the defence, nor was any application made in the course of the trial for leave to amend the plaint accordingly. The question therefore arises, was the judge entitled to decree against the appellant on the basis of apparent membership of the firm, when the only basis pleaded was actual membership. The answer to this question depends, I think, on whether any prejudice was caused to the appellant, in that judgment was given against him on an unpleaded cause of action which he had no reason to anticipate and no opportunity to prepare to meet. There are indications on the record that the appellant was prepared to meet a case based on apparent membership, although the ingredients required to found such a cause of action had not been pleaded. One is that in para. 3 of his defence, as already noted the following appears –

“Defendant will also contend that he never had any dealings with the plaintiff in respect of the said firm.”

This appears to be directed against a possible contention by the respondent that there were dealings between the parties before the appellant ceased to be a partner in the firm, which is one of the ingredients of cause of action based on apparent membership. Another indication is that the judge was able, on the evidence, to make findings of fact as to all the ingredients necessary to justify the application of s. 40 (1) of the Partnership Act, and it is significant that this evidence was almost entirely elicited from the plaintiff’s witnesses by defence counsel, which to my mind again shows that the appellant was prepared to meet a case based on apparent membership. Furthermore, the respondent’s advocate in his final address referred to s. 40 (1) of the Partnership Act, and Mr. Khanna replied on the point, and there can be no doubt from reading the judgment that the judge considered that the case had been left to him to decide on alternative

causes of action based on actual as well as apparent membership of a firm. I consider that the failure to plead facts justifying the application of s. 40 (1) of the Partnership Act was an irregularity, and a serious irregularity, but one which is not fatal to the judgment pronounced in this case, because it was cured by the course of events taken at the trial, which as it proceeded was fought out on a basis which shifted from the pleaded cause of action of actual membership to the unpleaded cause of action of apparent membership, a shift which did not in my view cause prejudice to the appellant as he had obviously come prepared to meet that unpleaded cause of action and was largely responsible for making that unpleaded cause of action an issue in the suit. The other grounds of appeal to the effect that there was no evidence that the appellant ordered the goods, or that the goods were supplied to him, as an individual, and that items of evidence admissible against the first defendant, such as part payment by cheque, were not admissible against the appellant as an individual, are not relevant once the appellant's responsibility towards the respondent is fixed, as it has been, on the basis of his apparent membership of the firm at the material time. I would dismiss this appeal.

Duffus P: I have had the advantage of reading the judgments of Law, J. A. and Spry, V.-P. in draft.

The simple facts of the transaction and the more complicated procedure that followed are fully set out in the judgment of Law, J. A.

The respondent company's case was based on the fact that both defendants were partners in the firm at the time that the goods were supplied to the firm. The defence, as filed by the appellant, was a denial that the appellant was a partner at the "material time". The real issues, as they eventually appeared from the evidence were –

- (a) was the appellant a partner at the time that the goods were supplied, or in the alternative:
- (b) was the respondent company entitled still to treat the appellant as being a member of a firm by virtue of the provisions of s. 40 (1) of the Partnership Act.

These were in fact the main issues before the Court but the second issue was not set out in the pleadings by either party. I blame both parties for this omission. The respondent company were at first really relying on the simple fact that the appellant was a partner at the material time but it does appear from the evidence of its principal witness – Mr. M. C. Patel – a director of the company, that the company's advocate had searched the register of business names and had discovered that the appellant was not a partner after 1 January, 1967. No doubt the advocate at the same time must also have ascertained that this change was not made in the register until 20 November 1967, by notice dated 17 November 1967. The dates of the relevant transactions in this case were in June, July and August 1967, and apparently, and certainly not unreasonably, the respondent did not accept as a fact that the appellant was not a partner at the relevant time. He did, however, know before he filed his plaint that the appellant was claiming that the partnership had ceased and if eventually, as he did in fact do, he relied on the provisions of s. 40 of the Partnership Act, then he should have raised this as an issue in his pleadings. On the other hand, I am of the opinion that the appellant was equally at fault in not pleading in his defence the allegation that he had been a partner but that he had retired from the partnership as from 1 January 1969. I agree with Spry, V.-P. on this point and in the circumstances of this case I do feel that the defence should have fully set out as alleged facts that the partnership had existed but had been dissolved before the transactions took place. This was the most material part of the defence.

The facts, however, eventually came out during the course of the trial and evidence was given on the two main issues as to whether the defendant was still a partner at the relevant time or if not, whether the conditions provided for by s. 40 (1) of the Partnership Act prevailed.

The respondent company's representative – Mr. Patel – gave evidence (elicited in cross-examination) that the appellant had been introduced to him by the first defendant as his partner in May or June 1966, and that he was not informed that he had ceased to be a partner before the transactions took place. The Acting Registrar of Business Names also gave evidence that the two defendants had been registered as partners under the Business Names Registration Act on 19 May 1966, and that it was only on 18 November 1967, that a notice of change was filed, setting out that the appellant had retired from the partnership on 1 January 1967. The appellant also gave evidence denying that he had been introduced to Mr. Patel by the first defendant as his partner and stated that he had retired from the partnership on 1 January 1967. He explained the fact that the notice of change of partnership was not filed until 18 November 1967, by saying that it was the first defendant who should have filed this notice and that he only discovered that this had not been done in November 1967.

No issues were framed in this case but in their final addresses the advocates for both parties dealt with the question of the second defendant's liability under s. 40 (1) of the Partnership Act. The issue was first raised by Mr. Patel for the respondent company in his address and then Mr. Khanna was allowed to address further on this point. There can be no doubt that the second defendant's liability under s. 40 (1) aforesaid was in issue at the trial and that both parties dealt with this issue and that the trial judge also regarded this as an issue and eventually decided the action on this point.

In this case I agree that the respondent should have pleaded his reliance on the provisions of s. 40 (1) of the Partnership Act and I agree with Spry, V.-P. that these provisions are founded on the basis of the doctrine of estoppel. It must, however, be borne in mind that the respondent first relied on the fact that the appellant was still a partner at the relevant time and he did, in fact, have a good prima facie case on this issue. On the evidence accepted by the trial judge the first defendant had introduced the appellant as his partner in May and June 1966; the partnership still continued to trade and do business in the partnership name, the appellant had not notified the respondent that he had retired from the partnership nor did he advertise this fact in the Gazette or elsewhere, and it was a fact that his name was still, on the relevant dates, in the Business Names Register as a partner of the firm. The trial judge made no finding on this issue as he relied on the provisions of s. 40 (1) of the Partnership Act in finding that the appellant was still liable to the respondent as a partner in the business. The respondent would, in all probability, have pleaded the benefit of the provisions of s. 40 (1) in his reply if the appellant had, as he should in my opinion have done, properly pleaded that he had retired from the partnership on 1 January 1967, in his defence. I entirely agree with Law, J. A. that at the trial the applicability of s. 40 (1) had become one of the issues in the case and there was undoubtedly sufficient evidence to justify the trial judge's findings.

In the circumstances of this case the omission to plead s. 40 (1) was an irregularity but it was such an irregularity that clearly did not affect the merits of the case and it would, in my opinion, be a failure of justice if we now allowed this appeal.

I agree therefore that this appeal be dismissed with costs and as Law, J. A. also agrees there will be an order accordingly.

Spry VP: I have had the advantage of reading in draft the judgments of Law, J. A., and Duffus, P. After anxious consideration and some hesitation, I regret that I am unable to agree with their conclusions.

I do not think it necessary to restate the facts. The judge made no express finding on the question whether or not the partnership between the appellant and Lalji Ratna was dissolved, as the former alleged, on 1 January 1967, but based his decision on the application of s. 40 (1) of the Partnership Act. It is necessary, therefore, to consider the effect of that subsection.

There is no doubt that at common law a retired partner was estopped from denying liability for the price of goods supplied after he had ceased to be a partner but before that fact had come to the knowledge of the seller, where the seller had previously known him to be a partner. This appears clearly in the judgment of Lord Selborne, L. C., in *Scarf v. Jardine* (1882), 7. A.C. 345, when he said,

“the principle of law, which is stated in Lindley on Partnership is incontrovertible, namely that ‘when an ostensible partner retires, or when a partnership between several known partners is dissolved, those who dealt with the firm before a change took place are entitled to assume, until they have notice to the contrary, that no change has occurred;’ and the principle on which they are entitled to assume it is that of the estoppel of a person who has accredited another as his known agent from denying that agency at a subsequent time as against the persons to whom he has accredited him, by reason of any secret revocation.”

I see no reason to suppose that the position in England was in any way altered by the enactment of the Partnership Act 1890. Section 36 (1) of that Act is expressed as entitling a person dealing with a firm to treat a retired partner as still being a member of the firm until he has notice of the change. It is not expressed as imposing a liability on the retired partner. This appears to preserve the principle of estoppel. I know of no authority to the contrary, while all the authors of textbooks appear to share that view.

The Partnership Act of Uganda was undoubtedly derived from the English Act, and s. 40 (1) of the former is in identical terms with s. 36 (1) of the latter. In my opinion, it should be interpreted similarly, as giving rise to an estoppel.

The general rule is, I think, that where it is sought to rely on an estoppel, the facts which give rise to it must be pleaded *Balwant Singh v. Kipoech arap Serem*, [1963] E.A. 651 and relief is not normally given which is not founded on the pleadings *Gandy v. Caspair Air Charters Ltd.* (1956), 23 E.A.C.A. 139. The failure to plead those facts may, however, not be fatal where they are proved in evidence and where the question of estoppel is in fact one of the issues at the trial *Harnam Singh v. Jamal Pirbhai* (1955) 22 E.A.C.A. 1.

In the present case, the material facts on which the judge found estoppel were, first, that the appellant had, in May 1966, been introduced to a director of the respondent company, a Mr. M. C. Patel, as a partner in the firm of Mistry Lalji Ratna & Company and, secondly, that the respondent company had, at the time when the goods were supplied, no notice that the appellant had ceased to be a partner. Neither of these facts were pleaded either in the plaint or by way of reply, nor was any application at any time made for leave to amend, although Mr. M. C. Patel admitted that he was aware, before the plaint was filed, that notice had been given to the Registrar of Business Names that the appellant had retired from the partnership on 1 January 1967, and the defence was a denial that the appellant had been a partner at any material time.

Estoppel was certainly never expressly made an issue in the suit. When opening his case, the advocate for the respondent company said –

“The issue is – was the 2nd defendant a partner in the firm of Mistry Lalji Ratna & Co. at the relevant time.”

In examining his main witness, Mr. M. C. Patel, he made no attempt to bring out the facts necessary to found an estoppel: indeed, I think it is clear that if there had been no cross-examination, the case could not have been decided on the basis of s. 40 (1). The respondent company based its case fairly and squarely on the assertion that a partnership was actually in existence when the goods were sold and delivered. It was only in his closing address that the advocate for the respondent company made what appears almost a passing reference to s. 40.

It might be argued from the judge’s note of Mr. Khanna’s opening address for the defendant that he was anticipating the invocation of s. 40, because he is recorded as saying “No evidence of any *continuous account*”. There is nothing in his closing address on the subject of estoppel, but he was allowed to reply, when he is recorded as saying that s. 40 (1) had no application, because it deals with a situation where there is a continuous account. This appears to explain his opening remark.

I may interpose here that I fully agree with the judge that s. 40 (1) is not to be interpreted as narrowly as Mr. Khanna suggested. It is significant that that subsection refers to “apparent members”, whereas sub-s. (2) refers to “persons who had no dealings with the firm”. If, as the judge found as fact, the appellant was introduced to Mr. M. C. Patel as a partner in the firm, that was enough, in my opinion, to make him an “apparent member”, whether or not a course of dealings followed.

The fundamental question on this appeal is whether, when estoppel had not been pleaded or made an issue or seriously argued, the judge was entitled to base his judgment on it.

As I see it, there is an essential difference between a case against a person who was actually a partner at the time of a transaction and one against a person who was not a partner, but who is precluded by the principle of estoppel from relying on that fact as a defence, although I see no reason why they should not be pleaded in the alternative. Here, a case based on estoppel was not pleaded either expressly or by implication. It was not a part of the case as presented for the respondent company. It seems to have been touched on by Mr. Khanna but only by way of brushing it aside. The fact that he was permitted to reply is itself an indication that the reference to s. 40 had introduced a new element into the case. In these circumstances, I do not think the judge was entitled to decide the case on a basis of estoppel, even though facts which would have supported a plea of estoppel had emerged during the proceedings. I think this is very much more than a technicality and I am not prepared to surmise what course the trial would have taken had it been differently pleaded and differently presented. For these reasons, I would have allowed the appeal.

There seems to have been some confusion as to the capacity in which the appellant was sued. The respondent company had various courses open to it. It could have sued the firm of Mistry Lalji Ratna & Company in the firm name under O. 27, r. 1 of the Civil Procedure Rules and if the appellant had been served, r. 8 would have applied (see in this connection the proviso to r. 3 and also O.19, r. 47 (1) (c)). This was not done. Secondly, the respondent company could have sued Lalji Ratna and the appellant as individuals, pleading such facts as would establish that the former was liable as having actually ordered and received the goods and that the latter was estopped from denying liability. This was not done. The third course available, and that which was actually followed, was to sue Lalji Ratna and the appellant as individuals, alleging

liability on the basis of a subsisting partnership when the cause of action accrued. Finally, as I have already said, I think it was open to the respondent company to sue on the basis of an actual partnership but pleading estoppel in the alternative.

I would also criticize the defence. In my opinion, after denying that the defendants were partners at all material times, it should have continued “the partnership between them having been dissolved on 1 January 1967” or words to that effect. (See in this respect Form 15 in Atkin’s Court Forms (2nd Edn.) Vol. 30, p. 98.) I am, however, not prepared to say that it was evasive and there can have been no possible prejudice, since Mr. M. C. Patel said in cross-examination that he had instructed his advocate to search the Register of Business Names before filing the suit and had been told that Dhanji Ramji had ceased to be a partner on 1 January 1967. The plaint was therefore drafted with full knowledge of the appellant’s case.

Appeal dismissed.

For the appellant:

D. N. Khanna and M. C. Patel (instructed by *Monubhai Patel & Son*, Kampala)

For the respondent:

J. K. Patel

Shah v Attorney-General (No 2) [1970] 1 EA 523 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	14 March 1970
Case Number:	366/1968 (91/70)
Before:	Jones, Mead and Wambuzi JJ
Sourced by:	LawAfrica

[1] *Constitutional Law – Fundamental rights – Protection of property – Benefit of judgment is property – Act purporting to deprive person of it without compensation unconstitutional and void – Constitution of Uganda (1966) arts. 8 (2) (c) and 87 – Local Administrations (Amendment) (No. 2) Act, 1969 (U.).*

[2] *Constitutional Law – Fundamental rights – Protection of law – Right to enforce contract – Act purporting to deprive person of right to litigate on contract unconstitutional and void – Constitution of Uganda (1966) arts. 8 (2) (c) and 87 – Local Administrations (Amendment) (No. 2) Act, 1969 (U.).*

Editor’s Summary

The petitioner obtained judgment against the Government in a suit founded upon a contract between him

and the former Kabaka's Government of Buganda (see [1969] E.A. 261). The Government did not appeal but failed to pay the judgment. The petitioner obtained the necessary certificate of order from the High Court but the Treasury Officer of Accounts, the official responsible for payment, refused to accept service of the certificate. The petitioner then applied for mandamus on the officials responsible for payment. The Attorney-General applied to dismiss the application relying on s. 2 (1) of the Local Administrations (Amendment) (No. 2) Act, 1969, which had been passed after the judgment had been given. The petitioner claimed that the relevant provisions of that Act were unconstitutional and as depriving him of property without compensation and as depriving him of the protection of the law. This question was referred to the present Constitutional Court under art. 87 of the Constitution.

Held – (by Jones, J., and Mead, J.; Wambuzi, J. dissenting);

- (i) the Local Administrations (Amendment) (No. 2) Act, 1969 did not apply to the plaintiff's judgment debt because the Act deals only with contracts and the contract upon which the plaintiff's original suit had been founded had been merged in the judgment;
- (ii) "property" in art. (8) (2) (c) of the Constitution of Uganda includes a

contract; so that the Act was unconstitutional and void in that it provided for deprivation of property without compensation contrary to that Article;

- (iii) the Act was also unconstitutional and void in that it purported to deprive an aggrieved party of protection of the law, also contrary to art. 8 (2) (c), by the exercise of the Minister's powers under s. 1 to refuse to ratify contracts thereby preventing a party from suing.

Reference allowed.

Cases referred to in judgment:

- (1) *Re Sneyd; Ex parte Fewings* (1883), 25 Ch.D. 338.
- (2) *Wegg Prosser v. Evans*, [1895] 1 Q.B. 108.
- (3) *Economic Life Assurance Society v. Usborne*, [1902] A.C. 147.
- (4) *Burmah Oil Co. v. Lord Advocate*, [1964] 2 All E.R. 348.
- (5) *United States v. Caltex (Philippines) Inc. et al.*
- (6) *Liyanage V.R.*, [1966] 1 All E.R. 650.

The following considered judgments were read.

Judgment

Jones J: This reference arose out of a judgment of Sheridan, J., given on 13 December 1968 (reported at [1969] E.A. 261.)

The facts of that case, as far as they are relevant, were as follows:

“The plaintiff, under an agreement of 29 December 1965, made between him and the Kabaka's Government, undertook to introduce a financier to enter into a contract with the Buganda Government to finance development projects to the limit of £300,000. The plaintiff was to be entitled to a fee of £6,750 payable in two instalments; the first instalment to be paid on the signing of the agreement between the plaintiff and the government and the second instalment to be paid on the signing of the agreement between the financier and the government. The plaintiff duly introduced a financier, in the shape of a company in which he was a shareholder. The first instalment was duly paid and the agreement between the financier and the government was signed on 20 January 1966. The second instalment was not paid. It was common ground that the agreement between the financier and the government was never implemented because of the events of May 1966, which led to the disappearance of the kingdom of Buganda. The plaintiff sued the defendant for payment of the second instalment of the agreed fee. The defences pleaded were (1) that the contract had been frustrated by the events leading to the disappearance of the kingdom of Buganda and the fact that the projects referred to in the agreement were suited only to the needs of the defunct kingdom so that the defendant, the Government of Uganda, had not succeeded to any liability on the contract under the provisions of the Local Administrations Act, Schedule 4, Part II, para. 2 (a); (2) that the consideration payable to the plaintiff was unconscionable and that the instalment already paid was sufficient consideration; (3) that “the plaintiff had not carried out the covenants and agreements on his part contained in the agreement; (4) that the plaintiff being a shareholder in the financier company had made a secret profit to which he was not entitled.”

It was held

- “(i) there was no evidence that the rate of commission was excessive and, even if it was excessive, the

defendant, in order to show that

the consideration was bad, must prove something amounting to undue influence and this had not been done;

- (ii) although the plaintiff was a shareholder in the financier company, he was not the agent of the Government and therefore he had taken no secret profit in breach of his agreement with the Government;
- (iii) the agreement between the financier and the Government may have been frustrated but it did not follow that the plaintiff's commission agreement must also be frustrated."

Judgment was given for the plaintiff with costs. A decree was extracted, on the same day that the judgment was delivered.

On 23 December 1968, Mr. Shah's counsel wrote to the principal State-Attorney in the Attorney-General's Department, Kampala, requesting him to advise the appropriate Government Department to effect payment of the principal sum due to him under the judgment.

On 29 May 1969, the costs in the suit were taxed and allowed at Shs. 22,504/-.

As no reply was sent to Mr. Shah, or his counsel to his letter of 23 December, and no payment was made, another letter was sent to the principal State-Attorney, some six months later on 2 June 1969, requesting him to arrange for the payment of the decretal amount to Mr. Shah.

This request was also ignored.

Due to the inactivity, deliberate or otherwise, of the Attorney-General's Department, the present petitioner Mr. Shah was constrained, through his counsel, to move the Deputy Chief Registrar of the High Court for a certificate of order, against the Government pursuant to the provisions contained in s. 20 of the Government Proceedings Act (Cap. 69) and r. 14 of the Civil Procedure (Government Proceedings) Rules.

A certificate of order was issued by the Deputy Chief Registrar on 7 July 1969.

That certificate was served on Mr. Gaiger, principal State-Attorney on the same day. He accepted service, and signed a copy of it, which he returned to Mr. Shah.

On the same day, the same procedure was followed, when a copy of the same order was served on a Mr. J. M. Mascarenhas, an officer on special duty (Finance, Buganda Affairs, Ministry of Regional Administration). He also accepted service.

On the following day, 8 July 1969, Mr. Shah attempted to effect service of the certificate of order on a Mr. A. Z. Hitimana, the Treasury Officer of Accounts. The nature of the certificate was explained to him. He declined to accept service of the certificate. He refused either to put his signature on the certificate, or to retain the duplicate of the said certificate stating that under no circumstances would he retain any document.

The certificate of order issued by Mr. Sebalu, the Deputy Chief Registrar made in pursuance of the Civil Procedure (Government Proceedings) Rules, set out the decree of the High Court, its effect, and finally a certificate of the indebtedness of the Government under the decree on 7 July 1969, and its future liability for further interest, until the decretal amount was paid.

This court was not informed why Mr. Hitimana refused to accept services of the document, if he condescended to give any explanation at all, nor under whose instructions he was acting, that is, if he were acting under instructions from any superior officer.

The next step in this unhappy story was that a Chamber Summons was taken

out on 6 October 1969, seeking leave to apply for an order of mandamus directed to the Treasury Officer of Accounts, and the officer on special duty (Finance), Buganda Affairs, Ministry of Regional Administration, to pay to Mr. Shah the amount set out in the certificate of order issued by the Deputy Chief Registrar to the Government.

The summons was heard ex parte by Goudie, J., on 15 October 1969. He granted leave to apply for an order of mandamus.

Pursuant to that order, a notice of motion was filed in the High Court. The notice of motion was set down for hearing on 5 November 1969.

On 31 October 1969, a counter notice of motion was filed by counsel for the Attorney-General. In his notice counsel stated that he would move the court:

- “(1) for a declaration that the proceedings instituted by Shah were void; and
- (2) for an order that the proceedings be dismissed pursuant to subsection (1) of Section 2 of the Local Administrations (Amendment) (No. 2) Act of 1969, on the ground that the agreement referred to in paragraph 3 of the plaint had not been ratified under the provisions of sub-paragraph (a) of paragraph 1 in Part II of Schedule 4 of the Local Administrations Act 1967.”

That notice of motion was also set down for hearing on 5 November 1969.

On 3 November 1969, a second notice of motion was filed by Mr. Shah's counsel seeking a declaration that under sub-s. (1) of s. 22 of the Constitution of the Republic of Uganda the provisions of The Local Administrations (Amendment) (No. 2) Act, No. 31 of 1969 and in particular the following provisions namely:

“Notwithstanding any judgment or order made in the proceedings or any provisions of Government proceedings act, declare such proceedings void and dismiss the proceedings.”

appearing in cl. 2 (1) of the said Amendment Act were inconsistent with the provisions of s. 8 (2) (c) of the Constitution, in so far as they deprived the applicant of property without compensation, and as such were void as contravening s. 1 (2) of the said Constitution.

This notice was set down for hearing on 5 November 1969.

Goudie, J., heard the motions. It was suggested that as the three motions were inter-related, they should be heard together. After some adjournments and discussions, the nature of which is it not necessary to go into fully at this stage, it was decided on 8 January 1970, to refer the matter to this court, in the following terms:

“NOW THE QUESTION OF LAW referred to the court under art. 87 of the Constitution is:

Are the provisions contained in s. 2 of the Local Administrations (Amendment) (No. 2) Act, 1969, consistent with the Constitution and in particular art. 8 thereof, more specifically art. 8 (2) (c) and 8 (5) and (6)?

Should the Constitutional Court decide that the said provisions of the said Act are consistent or are not consistent with the Constitution what is the effect on the validity generally of the said Act, particularly on the present proceedings?”

The reference was framed and was filed on 13 January 1970.

That is how the matter came before this court.

The issues are of importance not only to the party concerned but to commerce generally. It is one of the cardinal principles of the law of contract that a party should be reasonably certain of getting what he has contracted for.

Sheridan, J., in his judgment said that the plaintiff had done everything he was asked to do under the contract and the terms were not harsh and unconscionable. He therefore gave judgment to Shah against the Government.

As they did not appeal against that judgment, the Government must have considered it unassailable and must have accepted it as such.

The effect of this judgment was, that the contract under which the Government was sued, merged in the judgment, *Re Sneyd; ex parte Fewings in* (1883), 25 Ch.D. 338; *Wegg Prosser v. Evans*, [1895] 1 Q.B. 128). It became a judgment debt. Of all debts which one subject may owe another the one that confers the most important remedy is a judgment debt, or a debt which is due to him by the judgment of a court of record. The High Court of Uganda is a court of record. Mr. Shah's contract, after the judgment, became a debt of record.

He acquired a valuable right. In fact, it is a species of personal property, viz: a chose in action, which is assignable, and if it is assigned it confers upon an assignee the same rights as the assignor had in the debt.

After the decree had been extracted, and the period granted to appeal had elapsed, the judgment creditor had the right to invoke the due process of law, to enable him to enjoy the fruits of his judgment. This is what Shah, as judgment creditor, tried to do. He made two attempts to obtain satisfaction. These proved abortive, in fact his requests for payment over a period of six months were ignored. The mere recital of these facts, is sufficient comment on the attitude of the Government.

It was not surprising therefore that in July Shah proceeded to make the first and more formal step to enforce his rights. He took out a certificate of order pursuant to the provisions of s. 20 of the Government Proceedings Act (Cap. 69) and r. 14 of the Civil Procedure (Government Proceedings) Rules. The senior State-Attorney did not ignore this step, neither did the officer on special duty (Finance) Buganda Affairs, Ministry of Regional Administration.

Be that as it may, it seems that after the service of the certificate, the Attorney-General's Department was galvanized into action. The result was that the Local Administrations (Amendment) (No. 2) Act, 1969, found its way on to the Statute Book. The date of the commencement of the Amendment Act was 12 September 1969.

It would be convenient at this stage to refer to the parent Act. Due to the events of 1966 the kingdoms of Uganda disappeared. Under s. 1, Part I of Sched. 4 of the Local Administrations Act, 1967, the Uganda Government took over the assets, funds, rights and liabilities and obligations which belonged to, or were binding on a former administration immediately before the commencement of this Act, and by virtue of this Act. Without further assurance they became vested in, and became binding upon the succeeding administration, with certain reservations. These qualifications were recited in Sched. 4, Part I in s. 3 of the said schedule. This section gave the Minister powers to refer certain contracts, which he considered unreasonably disadvantageous to the former administration at the time when they were made, to a tribunal, the composition of which was set out in s. 6 of the schedule. A right of appeal to the High Court from the decision of such tribunal was vouchsafed in s. 5. That was the position with most of the

kingdoms.

That, however, was not the position with regard to the property, assets, funds, rights, liabilities and obligations of the Buganda Government. The Solicitor-General

said that in their magnanimity, and I am using his phrase, the Uganda Government seem to have taken over, without any reservations, the rights, liabilities and obligations of that government, which are referred to above. The provisions relating to Buganda are set out in Part II to Sched. 4 of the Act.

The effect of all this then was, that at the time the judgment was delivered, there were no conditions or restrictions attaching to the enforcement, or validity of contracts entered into by the former Buganda Government with anyone. Sheridan, J., gave his reserved judgment on that basis. Nothing was advanced to the contrary.

For three years after the “take-over” the Uganda Government seems to have been happy to honour its obligations under Part II of Sched. 4 of the Local Government Administrations Act 1967; at least there is no evidence to the contrary. It was not until they were faced with the judgment in the “Shah case” that they started taking stock of the situation. The Solicitor-General explained that the Government considered, when the Shah judgment was given, that the position of their obligations with regard to the liabilities of the defunct Buganda government, should be brought more in line with the position of their liabilities under contracts made with other kingdoms. To that end, he said, the Local Administrations (Amendment) Act (No. 2) was passed.

Whatever the intentions of the legislators were, I am unable to find in the provisions of the Amendment Act evidence that they had succeeded in doing what the Solicitor-General claimed that they had set out to do.

On the contrary what the Government has done in the Amendment is to resile from the position they so magnanimously took under the parent Act. It enacted that no contract with the former Buganda government should have effect or be enforceable, until a Minister had, by Statutory Instrument, ratified such a contract. It went on to state that the Minister was not to give that ratification, if it was in the public interest not to do so.

It is worthy of comment that the Minister’s decision is not appealable, or subject to review.

Under Part I of Sched. 4 to the parent Act, which deals with the Government’s intention to honour contracts made with other kingdoms, nowhere it is necessary for a Minister to ratify a contract. On the contrary all contracts would appear to be valid, except those which in the Minister’s opinion are unreasonably disadvantageous to the former administration. But he is not the final arbiter. Even in those cases, he has to refer the contract to a tribunal set up by him under s. 6 of Part I to Sched. 4, who would determine in fact whether the contract was unreasonably disadvantageous, and their decision would be subject to an appeal to the High Court. Far then from bringing the position relating to ex-Buganda contracts into line with the position of contracts made with other ex-administrations, the Amendment Act now puts contracts with the ex-Buganda government in a more disadvantageous position, *vis á vis* contracts entered into with the other ex-kingdoms.

Be that as it may, let me now turn to deal with the crux of this reference. Does s. 2 (1) and (2) of the Amendment offend against art. 8 of the Constitution, in so far as it purports to render nugatory the judgment debt into which Shah’s contract has now merged?

Section 2 (1) and (2) of the Local Administrations (Amendment) Act reads as follows:

“2(1) Where any proceedings arising out of a contract or agreement to which Part II of Schedule 4 of the Local Administrations Act 1967, applies, have been instituted before the commencement of this Act, and such contract

or agreement has not been ratified under the provisions of the said Part II of Schedule 4 of the said Act, as amended by this Act, the court in which such proceedings have been instituted, shall on the application of any party thereon, and notwithstanding any judgment or order given or made in the proceedings or any provisions of the Government Proceedings Act, declare such proceedings void and dismiss the proceedings.

- (2) Upon dismissal of any proceedings under the provisions of subsection (1) of this section, no judgment or order made in such proceedings, including any order as to costs shall be enforceable against any persons and no proceedings shall be brought against any person founded upon the contract or agreement out of which the original proceedings arose.”

It is not disputed that the proceedings from which the reference springs, were instituted before the coming into effect of the Amendment Act. In fact they were concluded, and a judgment had been given to the applicant on his contract, before the Act came into force.

The Solicitor-General said that as he saw the position, it was the clear duty of the applicant after the Amendment Act was passed to refer the contract which he had made with the ex-Buganda Government, to the Minister, even after he had received judgment in his favour. This was so he said even although the time within which the State could have appealed had elapsed, and his right to the judgment debt had become unassailable. He went on to say that his failure to have the contract ratified brought the proceedings within s. 2 (1) of the Amendment Act. If I understood him correctly, he also categorically stated that in his opinion, as Shah had filed a notice of motion seeking an order of mandamus, he had forfeited any right he had under the Amendment Act, to invoke the provisions of sub-s. (1) of s. 2 of the Act. I can see nothing whatsoever in the Amendment Act to support that contention.

Shah claimed that as a result of the judgment given in his favour, his original contract had changed its character completely, and its effect was stronger. That being so, he claimed that his judgment debt was not caught by the Amendment Act.

I would say at once that I am in full agreement with the view put forward for Mr. Shah, that after the judgment of Sheridan, J., his contract had merged into, and had crystallised into something quite new, and the original contract, as such, had disappeared. It therefore naturally follows that there was nothing which Shah could submit to the Minister for ratification under the Amendment Act. There is nothing in the Act which suggests that the judgment debt has to be ratified by the Minister.

As I have said the Solicitor-General argued that as soon as the Amendment Act was passed, it was Mr. Shah's duty to submit the original contract for ratification by the Minister. If that were so, that would be asking him to do the impossible, as the original contract had now merged in the judgment debt.

Assuming that the original contract was in being, after the judgment, the effect of the Solicitor-General's argument would be that the Minister was in effect reviewing the very basis on which the action was fought, and on which the judgment was given. If he found that the contract was one against the public interest, the Attorney-General's Department on his behalf could then ask the court to declare its own decision void. The Minister would in effect be usurping the functions of the High Court.

The consequences of rendering the judgment void would be two:

- (1) the applicant would be deprived of his judgment debt, which is a chose in action, and personal property;

- (2) depriving him of his right in law to execute his judgement; i.e. depriving him of protection of the civil law to have his decree executed.

The Solicitor-General did not agree, however, with the view that a judgment debt was “property” within the meaning of art. 8 (2) (c). He contended that the section referred to tangible property only. I see nothing either in art. 8 or art. 13 of the Constitution which curtails the meaning of property or limits it in any way.

During the hearing of the application the question was mooted that what the citizen of Uganda had was protection from deprivation of property and it was necessary therefore to look for any article or law which dealt with “protection” from deprivation of property. Attention was drawn to the provisions of art. 13 of the Constitution. The Solicitor-General had no hesitation however in saying that art. 13 had no bearing on the points at issue. Mr. Wilkinson was more guarded in his approach to art. 13. Both relied on the provisions of art. 8 of the Constitution. If the only property which is protected is “compulsorily acquired property” for specific purposes under art. 13 the protection afforded to the common man is very limited, and speaking for myself, I am not persuaded that this is so.

Be that as it may, the Solicitor-General developed his argument by saying that in his view art. 8 (2) (c) and 5 must be read together. He urged that the general effect of those two sections was, that where the enjoyment of any right over property is prejudicial to the public interest, a citizen lost the protection of his fundamental rights from deprivation of property without compensation under art. 8 (2) (c). The “Amendment Act” was passed to provide machinery for putting that into effect so far as contracts with the former Buganda government was concerned.

Section 1 (a) and (b) confers very wide powers on the Minister to ratify any such contract or not. These powers are not, as I have already pointed out, subject to review or appeal. He becomes the sole arbiter of what is in the public interest in respect of this limited class of contracts. The legislature seems to have delegated to him these wide powers, which can only be described in the circumstances as despotic. Furthermore, where those powers are invoked to nullify a judgment of the court, where the whole nature of the subject matter, which it was intended that he should control, has changed, it could be construed as an usurpation of the functions of the High Court. It certainly has the effect of eroding its authority, which I would have thought was itself not in the public interest.

I feel sure that could not have been the intention of the legislature.

As I see it, as soon as the decree had been extracted, and the time for appeal had elapsed, Shah had, at that time, under the law, certain rights, albeit procedural, to get satisfaction for his decree. With one fell swoop, he is deprived of these by the Amendment Act and we are asked to say that is all right. To say the least this is harsh and unconscionable.

Had the Amendment Act not had a retrospective operation, it might perhaps be less obnoxious.

No rule of construction is more firmly established than this, that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure; unless that effect cannot be avoided without doing violence to the language of the enactment.

This Amendment Act is clearly retrospective in effect. Without wishing to appear unduly critical, it appears to me that this piece of legislation is, to put it mildly, ill considered and makes serious in-roads into the fundamental rights of

the common man. To give a Minister these wide and unbridled powers may well, in itself, militate against the public interest.

After careful consideration of all the arguments raised and as custodian and protector of the Constitution, I have come to the following conclusions on the issues posed in this case:

- (1) As far as this case is concerned the Local Administrations (Amendment) (No. 2) Act, 1969 does not apply as there is no contract which the Minister could ratify; the contract had become a judgment debt after the judgment was delivered.
- (2) Even if the Minister could reopen the case, and exercise his powers of veto under the Amendment Act, and refused to ratify Shah's contract with the ex-Buganda Government, it would in effect be depriving Shah of personal property, i.e., a chose in action, which would be contrary to Article 8 (2), (3) and therefore would be ultra vires. I consider that the word property in that section has not a limited connotation, as suggested by the Solicitor-General but applies to "personal" as well as "tangible" property, and Article 13 has no relevance.
- (3) As to contracts which have already been executed (but no litigation has arisen out of them), are concerned, the Minister's powers under Section 1 of the Act are ultra vires Article 8 (2) (c) of the Constitution, as depriving an aggrieved party from "protection of the law" i.e., shutting out litigation and preventing him from ventilating his grievances in court.

It was pointed out during the hearing that in pre-independence days the Resident of Buganda had to give his assent before the Buganda Government could be sued. The difference between the two situations is this, that now there is a Constitution, but prior to 1962, there was not. Article 1 of the Constitution of the Republic states that the Constitution is the supreme law of Uganda. No ordinary piece of legislation can affect the fundamental rights enshrined thereon, nor change it. We were also referred by Mr. Solicitor to Acts done by the British Parliament after *Burmah Oil Co. v. Lord Advocate*, [1964] 2 All E.R. 348, which he thought were apposite in this case. With respect to his view, I consider that they have no relevance to Uganda, as Britain has no Constitution and Parliament is supreme. In Uganda, the Constitution is supreme.

- (4) Where the limited class of contracts which have been under discussion in this reference have not been fully executed (if there are any, after four years) on the face of it the Minister would appear to have powers to refuse to ratify such contracts, where they are not in the public interest. That means that they would have no effect whatsoever. In some of these cases a party, acting in good faith, may have carried out some acts, or done some work, for which under normal circumstances, he ought and could have got satisfaction. He could bring an action for instance on a quantum meruit in the courts. If this Amendment Act has the effect it appears to have, or which Mr. Solicitor claims it has, an aggrieved party could be excluded from going to the courts to demand his rights and to ventilate his grievances. In passing there is nothing in the Amendment Act which even hints that where work has been so carried out, that the man be entitled to some or any compensation for it.

Even in these cases, I would come to the conclusion that the Amendment is ultra vires the Constitution, and in my view the whole Amendment Act is bad and obnoxious.

Having regard to what I have said above I would refer this case back to Goudie, J., to hear the application for a writ of mandamus on its merits. I would award the costs of this reference to the petitioner.

Mead J: The events leading up to and the proceedings from which the question of law arises upon which a decision is sought of this court in accordance with art. 87 of the Constitution have been fully set out in the judgment of the President of this court, whose draft judgment I have had the privilege of reading. There is no need for me to repeat them. I have also had the privilege of reading the draft judgment of Wambuzi, J.

The questions of law are:

1. Are the provisions of s. 2 Local Administration (Amendment) (No. 2) Act, 1969, to which I shall hereinafter refer as “the Amending Act,” consistent with the Constitution, in particular art. 8 (2) (c) and 8 (5) and (6)?
2. Whether such provisions are consistent or inconsistent what is the effect on the validity generally of the Act particularly on the proceedings *J. S. Shah v. Attorney-General*?

By the judgment of the High Court entered on 13 December 1968 the applicant was awarded against the respondent Shs. 67,500/- with interest and costs. For the applicant it is contended, by Mr. Wilkinson, that s. 2 of the Amending Act deprives the applicant of the benefit of that judgment without compensation, and that this deprivation contravenes the provisions of the Constitution art. 8 (2) (c). The provisions of art. 8 (2) (c) are that every person in Uganda shall enjoy the right to:

- (i) Protection for the privacy of his home;
- (ii) Protection for the privacy of his other property;
- (iii) Protection from deprivation of property without compensation.

The applicant contends that the enforcement of his judgment would not be contrary to the provisions of art. 8 (5) so as to prejudice the public interest. For the State to justify the applicant being deprived of the benefit of his judgment without compensation the applicant contends that the State must show that the deprivation is in the public interest, and that it is in the public interest not to pay compensation for such deprivation.

The Solicitor-General for the respondent concedes that a judgment-debt is property, but contends that a judgment-debt is property of a category not falling within the meaning of property specified in art. 8 (2) (c). He contends that property protected from deprivation by art. 8 (2) (c) is limited to tangible property. The Solicitor-General instanced copyright as being other property not within the meaning of property specified in art. 8 (2) (c) and referred to the Copyright Act (Cap. 81) as being an Act that had excluded from the advantages of copyright some publications that had previously been accorded the benefit of copyright, and that the Act shortened the life period of copyright. Mr. Solicitor said that the Copyright Act had not been challenged as to validity. The fact that the Copyright Act has not been challenged does not mean its provisions, or some of them, may not be contrary to the provisions of the Constitution. Whether that is so or not is not a matter for consideration by this court. The court is solely concerned with the effect of the Amending Act.

The Solicitor-General referred to the Fifth Amendment to the American Constitution which provides, briefly, that private property shall not be taken for public use without just compensation. He contended that the Fifth Amendment does not cover all classes of property. In support of this contention Mr. Solicitor cited the case of *United States v. Caltex (Philippines) Inc. et al.* In my view the court there held that the claimant was not entitled to compensation not on the ground that the property, of which the claimant had been deprived by destruction, was not property falling within the class specified

by the Fifth Amendment, but on the ground that the property had been destroyed as an act of State necessity in time of war. The *Caltex* case is not of assistance to the respondent. The restriction or expansion of the meaning of property for the purpose of written constitutions of other Sovereign States is of little assistance to this court in the present case.

The Solicitor-General submits that the provisions of art. 13 of the Constitution have no application to the questions before this court. Mr. Wilkinson was, in general, in agreement with this submission but argued that if art. 13 were applicable its provisions covered the applicant's position. In my view art. 13 has no application to the present case. I will however touch shortly on the provisions of art. 13 in conjunction with art. 8.

Article 8 sub-clause 2 (c) places no limitation, express or implied, on the class of property against the deprivation of which without compensation a person in Uganda is entitled to protection. All property of whatsoever nature is protected subject only to the qualifications of sub-clauses (5) and (6). Article 8 provides against deprivation. Deprivation means divesting, keeping out of enjoyment, causing loss, for example by taking away, by destruction, or by causing extinguishment, as of a right. Article 13 provides that, where the necessities set out in sub-clause (1) (a) of that article require, property of any description may be compulsorily taken possession of, and any interest in or right over property may be compulsorily acquired subject to the provisions of sub-clauses (b) and (c). None of the necessities provided for in sub-clause 1 (a) is applicable to the present case, where the property is a judgment debt. Article 8 is an all-embracing article. Article 13 an Article of limitation. It would be contrary to the very spirit of the Constitution to suggest that there is a limit on the class of property against the deprivation of which without compensation a person is entitled to protection.

To hold that a judgment debt is not property within the meaning of art. 8 would result in the position that it would be feasible for the Legislature at any time to enact legislation similar to this Amending Act absolving, for example, Government or any local authority or statutory corporation from the payment of any judgment debt howsoever arising. The judgment holder would thereby be deprived of his judgment debt. In my view the protection is absolute. No law may be enacted that violates the right to protection conferred by art. 8 (2) (c), subject to the provisions of sub-clauses (5) and (6). The Constitution is paramount. It is not necessary to point to any law specifically setting out the protection afforded by the Constitution. If any law is enacted that effects deprivation of property without compensation, that law is ultra vires the Constitution. I would hold that a judgment debt is property from which a person in Uganda is entitled to protection against deprivation without compensation, subject to the provisions of sub-clauses (5) and (6) of art. 8.

It is contended for the respondent that it is not in the public interest to pay the applicant's judgment-debt, first because the Government now has no use for the buildings which the Buganda Government proposed to erect consequent upon the applicant obtaining the prerequisite finance and, secondly, because to do so would impose a burden on tax-payers. As to the first ground of objection, Mr. Wilkinson argued that the applicant's judgment does not arise out of a building contract but out of an agreement to introduce a financier to the Buganda Government who would finance development projects. With that I agree. As to the second ground of objection, any Government financial liability normally imposes some burden on the tax-payers. I would hold there is no validity in either ground of objection. In my view there would be no prejudice to the public interest as defined by art. 8 (5), by the enforcement of the applicant's judgment debt. Although the respondent, as defendant in the suit *Shah v. Attorney-General* did not raise in that suit as a ground of defence that the bargain was

against public interest to fulfil it was pleaded by the respondent that the bargain was unconscionable. This ground was considered by the trial judge and rejected. The ground that the bargain was unconscionable was in effect a plea that it was contrary to public interest to implement.

The Solicitor-General contends that the applicant has not been deprived of anything because by the operation of the Amending Act the State has not and will not be enriched. Enrichment need not be by cash or property received, it can equally occur by absolvment from payment. If the Government is absolved from the payment of the applicant's judgment debt, as it would be if the provisions of the Amending Act are enforceable, the Government will be enriched by not having to pay the amount of that debt.

The Solicitor-General contends that until an order is made under the provisions of s. 2 of the Amending Act declaring void the proceedings in the suit *Shah v. Attorney-General* the applicant still has the right to apply to the Minister under para. 2 (a) of Part II of Sched. 4 of the Local Administrations Act, as amended by the Amending Act, for ratification of the original contract. Mr. Wilkinson submits that the original liability under the contract has been merged in the judgment entered in the suit. The applicant's claim against the Government, by virtue of the judgment, is therefore now not on the contract but on the judgment. The claim is now based on a debt of court record. With that submission I agree. If persuasive support for this view is necessary it is to be found in the judgment of the English Court of Appeal in *Re Sneyd ex parte Fewings* (1883), 25 Ch.D. 338. The judgments of Cotton, C.J., at pp. 349-352, Lindley, L. J., at pp. 353-4 and Fry, L. J., at p. 355 were cited with approval by the Earl of Halsbury, L. C. in *Economic Life Assurance Society v. Osborne*, [1902] A.C. 147, at p. 149. The applicant cannot now apply to the Minister for ratification of his contract. His contract has been superseded by the judgment. It would be beyond the Minister's power to ratify a High Court judgment. The applicant's position under the Amending Act is that he has a judgment against the Government. He cannot apply for ratification of the contract on which the judgment is based. He is faced with the certainty of his judgment being declared void under s. 2 of the Amending Act. All judgments obtained against the Government prior to 12 September 1969, in consequence of the provisions of the Local Administrations Act, No. 18 of 1967, Sched. 4, Part II, are equally affected. Section 2 of the Amending Act provides that upon the application of any party to the proceedings in which the judgment was pronounced the court in which such proceedings were instituted shall declare the proceedings void. Thereupon the judgment becomes unenforceable, as does also any contract upon which the proceedings were founded. In the result the applicant and all holders of similar judgments are deprived, without compensation, of the benefits of their judgments. Section 2 of the Amending Act makes no provision for the court to decide whether or not it is in the public interest to deny the judgment holder of the benefit of his judgment, or to decide whether or not, prior to judgment, the contract or agreement upon which the proceedings were instituted is contrary to the public interest to fulfil. The Amending Act arbitrarily sets aside both the judgment and the contract or agreement.

I would hold that s. 2 of the Amending Act is ultra vires art. 8 (2) (c) of the Constitution in that it deprives any holder of a judgment in general and the applicant in particular of the benefit of his judgment without compensation.

In my view a judgment affected by the Amending Act does not become unenforceable by reason of the Amending Act, retrospective to a date prior to the date of judgment, effecting an alteration in the law upon which the judgment was based. The judgment holder has an ascertained and vested right; a judgment of record. If a judgment validly based on the law as at the date of its judgment could so become

unenforceable there would be no value in a judgment. It would

lose the very certainty a judgment confers. If such a proposition were held valid it would result in chaos. A judgment stands until it is altered or set aside on review or on appeal. A judgment is a complete and final determination of all matters in controversy between the parties to a suit – Judicature Act, s. 32. Legislation altering the law upon which a judgment is founded made at a date subsequent to the date of the judgment with effect as a date prior to that judgment cannot violate that judgment. I would hold such effect to be ultra vires the Constitution. It would deprive a judgment holder of his ascertained rights, thus constituting deprivation of property, without compensation.

Section 2 of the Amending Act compels a court to declare void any proceedings pending before it and any judgment entered by the court without leaving any discretion vested in the court. The Constitution defines the limits of the powers of the Legislature, the Executive and the Judiciary. The Constitution manifests an intention to secure to the Judiciary freedom from political, legislative and executive control. In my view the Legislature's direction under the provisions of s. 2 of the Amending Act as to what order a court shall make is usurping the functions of the Judiciary. The case of *Liyanage v. R.*, [1966] 1 All E.R. 650, a constitutional case involving a challenge to the validity of legislation enacted under the Ceylon Constitution, is of strongly persuasive value in considering the validity of the Amending Act. I would hold that s. 2 of the Amending Act, providing as it does that in the circumstances therein appertaining the court shall, on the application of any party to such proceedings, declare the proceedings void, is ultra vires the Constitution.

It remains for consideration the effect on the validity of the Amending Act generally. By this I take it the court is required to consider the provisions of s. 1 of the Amending Act substituting for Part I of Sched. 4, Para. 2 of the Local Administrations Act the paragraph 2 as in the Amending Act set out.

It was contended by the Solicitor-General that the provisions of s. 1 of the Amending Act, whereby the Minister's ratification of a contract or agreement to which the Government of the former Kingdom of Buganda was a party is made a prerequisite to the contract or agreement being enforceable, are intended to have the same effect on such contracts as the provisions of Sched. 4, Part I of the Local Administration Act, 1967 concerning contracts or agreements made with the Governments of the other former Kingdoms. The effect is not the same. Schedule 4, Part I provides at para. 3 that where any claim is made under a contract or agreement and the Minister is of the opinion that the contract or agreement was or was likely to be unreasonably dis-advantageous to the former administration at the time it was made the Minister may refer the contract to a tribunal consisting of a judge or senior magistrate appointed by the Chief Justice, and two other members to be appointed by the Chairman of the Public Service Commission. From this tribunal appeal lies to the High Court on a question of fact or law. The Minister is not directed by the legislature not to ratify any such contract or agreement should he consider it was or was likely to be unreasonably disadvantageous to the former administration at the time it was made. In the case of contracts or agreements made with the Government of the former Kingdom of Buganda the Minister is the sole arbiter. The fact the Legislature has chosen to differentiate between the former Kingdom of Buganda and the other former Kingdoms on a procedural matter does not in itself make the Buganda procedure ultra vires the Constitution. The test is whether such procedure infringes upon the fundamental rights laid down by art. 8 of the Constitution. The Amending Act vests in the Minister the power to decide whether it is in the public interest to ratify a contract or agreement. Mr. Wilkinson contended that to vest the Minister with sole discretion without right of appeal was ultra vires the Constitution. The Solicitor-General contended that a right of appeal from the Minister's decision was implied, and that in any

event the determination of what was or was not in the public interest was a matter for the Minister and not for the court. On this latter point Mr. Wilkinson contended to the contrary, referring to an opinion of the Supreme Court of India on Special Reference No. 1 of 1944 to support his contention that determination as to what was or was not in the public interest was a matter for determination by the court. The Indian Reference is of interest. In my view, there is no prohibition contained in the Constitution preventing the Legislature from vesting in the Minister a discretion to determine whether or not it is in the public interest to ratify a contract or agreement coming within the provisions of Sched. 4, Part 2, para. 2 of the Local Administration Act. What in my view is objectionable is to make the Minister's decision final. As the Amending Act stands there is no provision for appeal from that decision. For an appeal to lie it must be specifically prescribed, and the court to which appeal lies must be stated. In the present case the Legislature is empowering the Minister to preclude a person holding a concluded contract or agreement made with the former Kingdom of Buganda from enforcing his rights thereunder at law on the ground that it is contrary to the public interest so to allow. In my view that is an infringement of the fundamental right enshrined by art. 8 (2) (a), namely the enjoyment of every person in Uganda of the protection of the law. At the date of the commencement of the Local Administrations Act a holder of a concluded contract or agreement made with the former Kingdom of Buganda had the right to have the validity of that contract or agreement tested in the court. Adjudication as to whether or not a contract or agreement is enforceable is a matter for the court, The Minister may properly be invested with the power of refusing to ratify a contract or agreement of the nature this court is considering on the ground that it is not in the public interest so to do, but the final adjudication, if any person is dissatisfied or aggrieved by the Minister's decision, must rest with the court. The Constitution expressly provides the protection of the law. That protection is the right of a dissatisfied or aggrieved person to have tested in the court the validity of the contract or the validity of the Minister's decision. Legislation that deprives a person of that right is ultra vires the Constitution. That right is preserved in respect of contracts or agreements made with other former Administrations. It is not for the court to speculate as to how or why the differentiation arose. It is the duty of the court to construe the provisions of the Constitution and to ensure that the rights thereby enshrined are not violated by legislation.

I would hold that the provisions of s. 1 of the Amending Act are ultra vires art. 8 (2) (a) of the Constitution in depriving a party to a contract or agreement made with the former Kingdom of Buganda of the right to apply to the court to test the validity of such contract or agreement.

I am in agreement with the order proposed to be made by the President of this court.

Wambuzi J: I have had the benefit of reading the judgments of the President of this court and of Mead, J. I agree with the historical background to the reference to this court and to the question of law before this court as set out in the judgment of the President, but I do not agree with the conclusions reached by the majority on the question of law.

In my view, the decision on the first part of the question before the court, i.e., whether the provisions in s. 2 of the Local Administrations (Amendment) (No. 2) Act, 1969, are consistent with the Constitution, depends not only on the meaning of the word "property" in art. 8 (2) (c) but also on the meaning of that paragraph. Does it confer a right that a person shall not be deprived of his property without compensation or does it confer a right that a person shall enjoy protection from deprivation of his property without compensation? In

the former case, the article would be infringed upon proof of two things (1) that a person has been deprived of property and (2) that no compensation is payable. In the latter case, however, there will have to be proved, in addition, that there is protection against deprivation of property without compensation.

Upon analysis, para. (c) of the article read in full provides:

“(2) Every person in Uganda shall enjoy the fundamental rights and freedoms of the individual, that is to say, the right to each and all the following, namely,

.....(a)

.....(b)

(c) protection for the privacy of his home and [protection for the privacy of his] other property and [protection] from deprivation of property without compensation.

The words in square brackets do not appear in the paragraph; they are inserted for clarity.

The Solicitor-General was of the view that there is no difference between enjoyment of a right not to be deprived of property without compensation and the enjoyment of a right to protection against deprivation of property without compensation. Mr. Wilkinson was substantially of the same view. He argued that with or without the word “protection” the effect of the paragraph is that a person shall not be deprived of his property without compensation. It is significant to note that in paras. (a) and (b) of the same clause the word “protection” is omitted except as will be mentioned later. Paragraph (a) does not say “protection of life, liberty, security of the person . . . ” nor does para. (b) speak of protection of freedom of conscience, of expression and of assembly and association. Can it be said therefore that the word “protection” which is omitted in paras. (a) and (b) of that clause has no meaning in para. (c) where it is inserted? It does not appear unreasonable, in my view, to observe in this case the simple rule of construction that a change in wording connotes a change in meaning. Compare, for example, the Fifth Amendment of the American Constitution with our para. (c), the wording of the relevant part discussed in the case of *United States v. Caltex (Philippines) Inc. et al.* cited to this court is, “. . . nor shall private property be taken for public use, without just compensation.” There can be no doubt here that the Fifth Amendment of the American Constitution itself prohibits the taking of private property without just compensation. Far from doing this, our Constitution confers upon an individual merely a right of protection from deprivation of property without compensation.

In para. (a) of the clause, a right is conferred to an individual to enjoy “protection of the law”. The wording here is similar to that in para. (c). In the case of the enjoyment of the protection of the law, the protection is the law. A person may call in aid any law to protect himself in so far as that law offers him any protection. In the present case, the applicant is calling in aid the Constitution to protect himself. In the case of property, however, the protection is not named. All that the paragraph says is that a person shall enjoy protection for the privacy of his home and other property and from deprivation of property without compensation. The question is what and where is this protection.

Chapter III of the Constitution is headed “Protection of Fundamental Rights and Freedoms of the Individual.” It is necessary, therefore, to read the whole chapter to ascertain:

(1) the fundamental rights and freedoms, and

(2) the protection of those rights and freedoms. Article 8 sets out the rights and freedoms. The marginal note to that article reads: “Fundamental rights and freedoms of the Individual.” Clause (2) of the article reads:

- “(2) Every person in Uganda shall enjoy the fundamental rights and freedoms of the individual, that is to say, the right to each and all the following, namely,
- (a) life, liberty, security of the person and the protection of the law;
 - (b) freedom of conscience, of expression and of assembly and association and
 - (c) protection for the privacy of his home and other property and from deprivation of property without compensation.”

Articles 9 to 20 in effect define the rights and freedoms, set out the protection of those rights and freedoms and their limitations. The marginal notes to all those articles, without exception, include the words “protection from”, “protection of” or “protection for” a named right or freedom. Article 21 contains emergency provisions and art. 22 contains provisions for the enforcement of arts. 8 to 20; and art. 23, the last article in the chapter, contains interpretation provisions. I am aware of the controversy as to whether marginal notes can be prayed in aid of interpretation, the archaic objection being that they are not part of the statute or, in this case, the Constitution. The Government proposals for a new constitution dated 9 June 1967 had marginal notes. The Constituent Assembly considered the proposals with the marginal notes. The authentic copy of the Constitution contains marginal notes. They must be part of the Constitution and where the meaning of any part thereof is obscure, these marginal notes may be used in aid of interpretation. Be that as it may, even if the marginal notes were to be ignored, the text of each of arts. 8 to 20 is reasonably clear. Looking at Chapter III generally, therefore, it is evident that the fundamental rights and freedoms of the individual named in art. 8 can be ascertained only by reading the remaining articles in that chapter. For example, whereas art. 8 (2) (a) provides for the enjoyment of the right to life and liberty, art. 9 (1) provides the protection. It reads:

- “(1) No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law of Uganda of which he has been convicted.”

Clause (2) of the article contains limitations on the enjoyment of that right. Similarly, article 10 (1) provides:

- “(1) No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say, . . .” and a number of cases are then enumerated.

The same can be said of arts. 11 to 20. In other words, no provision in art. 8 (2) of the Constitution can be said to have been infringed unless it is shown that a corresponding provision defining and limiting the right or freedom has been infringed.

In so far as property is concerned, the protection referred to in art. 8 (2) (c) is, in my view, to be found in arts. 13 and 14 of the Constitution. Article 14 provides: “14. (1) Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.” Clause (2) of that article contains limitations upon the enjoyment of the right conferred under art. 8 (2) (c). The marginal note to that article reads: “Protection for privacy of home and other property.”

In the instant case, it is alleged that an individual has been deprived of his

property without compensation by virtue of the provisions of the Local Administrations (Amendment) (No. 2) Act, 1969 contrary to art. 8 (2) (c) of the Constitution. As discussed earlier, art. 8 (2) (c) merely confers the right to enjoy protection from deprivation of property without compensation and this protection has yet to be identified. It may be in the Constitution or in some other law. In very careful arguments by Mr. Wilkinson and the Solicitor-General, no law other than the Constitution has been quoted as providing that protection. Clause (1) of art. 13 provides:

- “(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say,
- (a) the taking of possession or acquisition is necessary in the interest of defence, public safety, public order, public morality, public health, town and country planning or the development or utilisation of any property in such manner as to promote the public benefit; and
 - (b) the necessity therefor is such as to afford reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property; and
 - (c) provision is made by a law applicable to that taking of possession or acquisition,
 - (i) for the prompt payment of adequate compensation; and
 - (ii) securing to any person having an interest in or right over the property a right of access to the High Court, whether direct or on appeal from any other authority, for the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right and the amount of any compensation to which he is entitled, and for the purpose of obtaining prompt payment of that compensation.”

The marginal note to this article reads: “Protection from deprivation of property.” This must be the protection or part of the protection referred to in art. 8 (2) (c) of the Constitution. There is a complete prohibition of any form of deprivation of property of any description unless the three conditions are satisfied, including provisions as to compensation. This article is similar in effect to the Fifth Amendment to the American Constitution referred to earlier. The limitations on the protection are set out in clauses (2) and (3) of the article.

It is Mr. Wilkinson’s argument that the Government has by a legal device, namely the Local Administrations (Amendment) (No. 2) Act, 1969, constructively taken possession of the property of the applicant; namely, the judgment debt, and has acquired the money due to the applicant from the Government before paying it to the applicant and none of the conditions laid down in paras. (a), (b) and (c) of art. 13 has been satisfied. To this extent, Mr. Wilkinson argues the Local Administrations (Amendment) (No. 2) Act, 1969 is ultra vires the Constitution. Although the Solicitor-General conceded that a judgment debt is property, he argued that it is not such property as is protected under the Constitution. The property must be capable of being taken possession of or being acquired. The Government had neither taken possession of nor acquired any property from the applicant in the sense that the Government was any richer after taking possession of or acquiring the property. The Solicitor-General further argued that there was power in the Legislature to curtail or even destroy the right to property without compensation in the public interest. This was the

effect of clause (5) of art. 8 pursuant to which the Local Administrations (Amendment) (No. 2) Act, 1969, was passed.

There can be no doubt that a judgment debt is property of some kind. It is assignable, but what the assignee gets is not the amount of the debt, but the right to recover the amount or so much of the amount as he can. The property the assignor has, therefore, must be the right to recover. Has the Government in the present case taken possession of or acquired this right? I have been at pains to find a definition of the word "possession" and in the end I agree with the expression "'possession' is a word that, perhaps like a great many words, is incapable of an entirely precise definition. Possession of a house is essentially different from possession of a gold watch. One has to look at the property possessed." The wording of art. 13 (1) covers every aspect of acquisition of things corporeal and incorporeal. It would appear that in the context of that clause, the words "take possession" are suitable only to the case of things corporeal. A judgment debt being only a right of recovery, which is a thing incorporeal, could not be taken possession of within the meaning of art. 13 (1), but could be acquired. The Concise Oxford Dictionary of Current English defines the word "acquire" as "gain by one self and for oneself". The question is, has the Government gained by itself and for itself by the legislation in question? The gain must be the right to recover, but can it be seriously argued that the Government has gained a right to recover against itself? If not, what has the Government gained? The Solicitor-General argued that the Government has not become any richer and consequently has acquired nothing. On the other hand, Mr. Wilkinson argued in effect that an extinction of an obligation to pay Shs. 67,000/- is equivalent to an acquisition of Shs. 67,000/-. That the Government has by some legal device acquired the money due under the judgment before paying it to the applicant. That the Government has constructively taken possession of the money. Plausible as this argument may sound, it would, in my view, be stretching the meaning of the expression "taken possession" and "acquired" beyond the realms of the provisions of art. 13 (1) of the Constitution. In the absence of any contrary intention, those expressions must bear their ordinary meaning. If, therefore, the property in a judgment debt is the right to recover, it is incapable of being taken possession of within the meaning of that article. It is not an interest in or a right over property which can be acquired. It would be ridiculous to talk of the Government acquiring an interest in the right to recover or acquiring a right in the right to recover. If, on the other hand, the property in a judgment debt is the amount of the debt, which in my view it is not, it would equally be difficult to see how, within the meaning of the article, the Government can take possession of what they already possess or acquire what they already have.

On perusal of the provisions of para. (c) of clause (1) of art. 13 some more light is thrown on the kind of property referred to in art. 13. The paragraph presupposes, as Mr. Wilkinson rightly conceded, that the compensation consists of money. Sub-paragraph (i) speaks of "prompt payment of adequate compensation" and sub-para. (ii) speaks of provision for the determination "of the amount of any compensation" and "prompt payment" thereof. On the question of adequacy of compensation, Mr. Wilkinson is of the view that an adequate compensation for a decretal amount of Shs. 67,000/- is Shs. 67,000/-. On this hypothesis, it is difficult to imagine the Constituent Assembly imposing a requirement for the payment of a compensation of Shs. 67,000/- for the compulsory acquisition of Shs. 67,000/-. Mr. Wilkinson, however, further argued that notwithstanding the wording of para. (c), the compensation need not be in the form of money. It could, for example, be in the form of shares in the Uganda Electricity Board or in the Uganda Development Corporation. This is an arguable point, but it requires determination only if it is shown that there has been a compulsory taking possession or acquisition of property.

In my view, the judgment debt in question which is nothing more than a right to recover the amount of the debt is not such property as is protected under art. 13 of the Constitution. It is not purported under the Local Administrations (Amendment) (No. 2) Act, 1969 to be taken possession of nor is it purported to be acquired by the Government. It is purported simply to be extinguished by the Legislature. In those circumstances, the question whether the taking possession or acquisition was in the public interest does not arise.

I now turn to the second part of the question of law before the court; namely, the effect on the validity generally of the said Act particularly on the present proceedings.

Article 63 of the Constitution provides:

“63. Subject to the provisions of this Constitution, Parliament shall have sole power to make laws for the peace, order and good government of Uganda with respect to any matter.”

Parliament has power, therefore, to legislate virtually upon any matter, provided such legislation is not inconsistent with the Constitution. Any law made by Parliament must be taken to be valid unless it is shown to be inconsistent with the Constitution, the supreme law. Is the local Administrations (Amendment) (No. 2) Act, 1969 in any way inconsistent with the Constitution? The effect of s. 1 of the said Act is to amend Sched. 4 of the Local Administrations Act, 1967 by subjecting the provisions of para. (1) thereof to the new provisions of para. (2). The provisions are set out in the judgment of the President of the court. Prior to the amendment all contracts and agreements by the Government of the former Kingdom of Buganda, were by virtue of the parent Act of 1967, automatically enforceable against the Government. The amendment now requires ratification. This is the law as from 12 September 1969 and I find nothing here inconsistent generally with the Constitution. Section 2 (1) of the amending Act, however, has the effect of nullifying any proceedings in respect of any contract or agreement instituted before 12 September 1969, on the application of a party to the proceedings. Two points emerge from this provision:

- (1) Is a party who has instituted proceedings before the amendment obliged to seek ratification?
- (2) Can Parliament nullify a judgment given in accordance with the law?

Strictly, the first question is not a matter for this court, having decided that s. 2 (1) of the Amending Act is not inconsistent with the Constitution, but as a matter of comment it is to be noted that the amending Act makes no provision saving any pending proceedings under the previous law. The effect of this is that they lapse unless they conform to the law as amended. A party who instituted proceedings which were pending at the commencement of the amending Act is obliged to seek ratification before he can enforce his contract or agreement. To this extent the amending law is retrospective. I must confess that this is a rather unusual provision because as a practice all procedural laws are normally made for the future. In this case, a party who has acted perfectly legally in instituting proceedings is told that he must in effect start all over again by first seeking ratification without which his contract or agreement becomes unenforceable.

What about the circumstances where the judgment has been given as in the present case? Section 2 (1) of the amending Act provides in effect that on the application of a party, the court shall declare the proceedings void notwithstanding any judgment or order given in the proceedings. Language apart, the Legislature appears to be saying that ratification shall be deemed to have been a requirement to the enforcement of any contract or agreement affected by the

legislation. This is an even more curious provision. It purports to reopen proceedings which are otherwise closed. Is such a law then valid? Article 58 (3) of the Constitution provides:

- “(3) Without prejudice to the power of Parliament to postpone the operation of any law or to make laws with retrospective effect, a bill shall not become law until it has been duly passed and assented to in accordance with this Constitution.”

It appears that Parliament has the power to make laws with retrospective effect and this power does not appear to be limited, objectionable as it may be in the present circumstances except as argued by the Solicitor-General, in art. 15 (4). The clause provides:

- “(4) No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed.”

It follows, therefore, that Parliament can make any law with retrospective effect provided such law does not offend any provision of the Constitution. Any judgment which is not in accordance with such a provision loses its foundation and becomes unenforceable. No doubt, this is a startling consequence. One bears in mind, of course, that the law in question regulates the assumption of obligations which prior to the Local Administration Act, 1967 were in a different authority and perhaps this is where the question of public interest comes in. Be that as it may, in the circumstances of this case, public interest is relevant to the justification of the amending law and not to its validity. A law may be unjust but that per se does not make it invalid. It has not been shown that there is no power to make the law in question. In my view, the law is not inconsistent with any provision of the Constitution and consequently is valid. Its effect generally or upon the present proceedings, is a matter of construction of that law and does not concern this court.

By way of comment, part of s. 2 (2) of the amending Act, 1969, appears to be more penal than procedural. It is not easy to see why, if the amendment is to require ratification, a party who tries to enforce an otherwise legal right is estopped from resorting to his rights under the original contract or agreement.

To summarise, the right conferred by art. 8 (2) (c) is not that an individual shall not be deprived of his property without compensation, but that he shall enjoy protection from deprivation of property without compensation. The protection provided is in art. 13 (1) which covers property which is capable of being taken possession of or being acquired. The legislation in question does not provide for taking possession or acquiring the applicant's judgment debt. Therefore, the provisions contained in s. 2 of the Local Administration (Amendment) (No. 2) Act, 1969, are consistent with the Constitution. The Act is generally valid and the present proceedings are caught by it.

Reference allowed.

For the plaintiff:

P. J. Wilkinson, Q.C. and V. N. Ponda (instructed by *Ponda Agaria & Co.*, Kampala)

For the defendant:

P. J. Nkambo-Mugerwa (Solicitor-General) and *M. C. L. Gaiger* (Principal State Attorney)

Shah v Attorney General (No 3)
[1970] 1 EA 543 (HCU)

Division: High Court of Uganda at Kampala
Date of judgment: 19 May 1970
Case Number: 31/1969 (114/70)
Before: Goudie J
Sourced by: LawAfrica

[1] Civil Practice and Procedure – Execution – Government – Judgment debt owed by Government – Mandamus will issue to compel payment.

[2] Constitutional Law – Government – Proceedings against – Payment of judgment debt – Mandamus issued to compel payment by Treasury of amount of judgment debt.

[3] Prerogative Orders – Mandamus – Treasury Office of Accounts – Duty to pay judgment debt owed by Government – Mandamus granted – Government Proceedings Act, s. 20 (3) (U.).

[4] Prerogative Orders – Mandamus – Discretion to order – Order made to compel payment of judgment debt by Government.

Editor's Summary

The applicant had obtained judgment against the Government for Shs. 67,500/- interest and costs (see [1969] E.A. 261). The Government failed to pay, and the applicant then brought this motion for an order of mandamus directed to the officials responsible for making payment, to pay the amount of the judgment. The Government applied to have the motion dismissed, relying on the Local Administration (Amendment) (No. 2) Act, 1969. After the Constitutional Court had decided on a reference to it that the Act was unconstitutional and void, this motion was heard on its merits.

Held –

- (i) mandamus could issue to the Treasury Officer of Accounts to compel him to carry out the statutory duty to pay cast upon him by s. 20 (3) of the Government Proceedings Act;
- (ii) the court should in its discretion, make an order of mandamus.

Order of mandamus granted.

Cases referred to in judgment:

- (1) *R. v. Bank of England* (1780), 2 Doug. 524. 99 E.R. 334.
- (2) *R. v. Lords Commissioners of the Treasury* (1872), L.R. 7 Q.B. 387.
- (3) *Re Nathan; R. v. Commissioners of Inland Revenue* (1884), 12 Q.B.D.

- (4) *R. v. Registrar of Joint Stock Companies* (1888), 21 Q.B.D. 131.
- (5) *R. v. Commissioners for Special Purposes of the Income Tax* (1888), 21 Q.B.D. 313.
- (6) *R. v. Secretary of State for War*, [1891] 2 Q.B. 326.
- (7) *R. v. The Guardians of the Lewisham Union*, [1897] 1 Q.B. 498.
- (8) *R. v. Manchester Corporation*, [1911] 1 K.B. 560.
- (9) *R. v. Bishop of Sarum*, [1916] 1 K.B. 466.
- (10) *R. v. Commissioners for Special Purposes of the Income Tax. Ex parte Dr. Barnado's Homes National Incorporated Association*, [1920] 1 K.B. 26.
- (11) *People v. Board of Education of City of Chicago* 323 U.S. 733.
- (12) *R. v. Dunsheath, ex parte Meredith*, [1950] 2 All E.R. 741.
- (13) *Chotey Lal v. State of Uttar Pradesh* (1951), 38 A.I.R. All. 228.
- (14) *Haji Yusufu Mutenda and Others v. Haji Zakaliya Mugayiasoka and Others*, [1957] E.A. 391.

Judgment

Goudie J: On 15 October 1969, leave was granted to apply for an order of mandamus directed to the Treasury Officer of Accounts and/or the Officer on Special Duty (Finance) Buganda Affairs, Ministry of Regional Administration, to pay to the applicant the decretal amount in Civil Suit No. 336 of 1968, wherein the present applicant was the successful plaintiff and the present respondent the defendant. The amount involved is a principal sum of Shs. 67,500/-, taxed costs of Shs. 22,504/-, plus interest, as set out in a Certificate of Order against the Government issued by the Deputy Chief Registrar of the Court pursuant to the provisions of the Government Proceedings Act and r. 14 of the Civil Procedure (Government Proceedings) Rules.

The applicant accordingly issued a Notice of Motion, applying for an order of mandamus in the same terms as his application for leave and the leave granted thereunder.

Before this application could be heard a counter-motion was filed by the respondent for a declaration that the proceedings instituted by the applicant were void and for an order that the proceedings be dismissed pursuant to sub-s. (1) of s. 2 of the Local Administration (Amendment) (No. 2) Act of 1969 (hereinafter referred to as “the Amending Act”).

Three days later, and again before the hearing of the applicant’s motion for an order of mandamus, the applicant filed a second Notice of Motion seeking a declaration that the provisions relied upon by the respondent in the Amending Act were ultra vires certain Articles in the Constitution of the Republic of Uganda.

Since, in the opinion of this court, a substantial question of law arose on the applicant’s second notice of motion which involved an interpretation of the Constitution, this court referred the question of whether or not the particular provisions of the Amending Act were ultra vires the Constitution for decision by a Constitutional Court consisting of three judges of the High Court. This reference was made under art. 87 (1) of the Constitution.

The reference was determined, by a majority decision of the Constitutional Court, on the basis that s. 2 of the Amending Act was ultra vires art. 8 of the Constitution. The President, Jones, J., further expressed the view that “the whole Amendment Act is bad and obnoxious”.

Article 87 (2) of the Constitution now requires this Court to dispose of the proceedings before it in accordance with the decision of the Constitutional Court.

There are, therefore, at present before this court –

1. The applicant’s notice of motion for an order of Mandamus.
2. The respondent’s notice of motion for dismissal of the proceedings as being void by reason of the provisions contained in the Amending Act.
3. The applicant’s second notice of motion for a declaration that certain provisions in the Amending Act are void as being ultra vires the Constitution.

In accordance with the decision of the Constitutional Court, the respondent’s motion for dismissal is itself dismissed with costs and the applicant’s second motion is granted with costs against the respondent. I do not agree with the respondent’s submission that there should be only one set of costs but account should be taken of the fact that the motions were on occasions heard together and the taxing officer

should endeavour to avoid duplication of costs. There will be a certificate for two counsel when two counsel were in fact engaged.

Finally, in the introductory part of the ruling, I wish merely to add that the background and history of all these proceedings is dealt with more fully in the

judgment of the President of the Constitutional Court and I agree entirely with his detailed statement of the facts ending with the words:

“That is how the matter came before this Court”.

I note that both the supporting and dissenting judgments of that court also accepted these without qualification.

I now consider the outstanding motion of the applicant for an order of mandamus.

The Solicitor-General, for the respondent, submitted that there were two issues only:

1. Is this the class of case in which an order against the State or any of its servants can be made?
2. If such an order can be made is the applicant in a position to ask this court to exercise its discretion in his favour?

Basically, I agree with this submission. Nevertheless, since the remedy of mandamus is in its origins and development, both at common law and by statute, essentially a product of the English Courts, having been aptly named the “flower” of the King’s Bench, I regard it as politic to consider certain preliminary factors. I propose first, to consider the nature of mandamus; secondly, to consider to what extent (if any) it is applicable in Uganda; and thirdly, what law should be applied in the event of mandamus being a process known to Uganda law.

As I have said mandamus is essentially English in its origin and development and it is therefore logical that we should look for an English definition. The Dictionary Of English Law by Earl Jowitt tells us that mandamus is “a prerogative order issued in certain cases to compel the performance of a duty” and that it was substituted for the writ of mandamus by the Administration of Justice (Miscellaneous Provisions) Act, 1938. It issues from the Queen’s Bench Division of the English High Court where “the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus, it is used to compel public officers to perform duties imposed upon them by common law or by statute . . . it is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual.”

That this definition is supported by the authorities is apparent when one considers the words of Lord Goddard, L. C. J. in *R. v. Dunsheath, ex parte Meredith*, [1950] 2 All E.R. 741 at p. 743, approved in India in *Chotey Lal v. State of Uttar Pradesh* (1951), 38 A.I.R. All. 228:

“Mandamus is neither a writ of course nor a writ of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do something or not to do something; the duty itself being of an imperative nature.”

The necessity for the respondent to be under a statutory or legal duty was emphasised in *R. v. Treasury Commissioner* (1872), L.R. 7, Q.B. 387.

Section 34 (1) of the (Uganda) Judicature Act, 1967, states:

“The High Court may make an order of

- (a) mandamus, requiring any act to be done.”

The only limitations on this power in the section clearly can have no application to the instant application. It is clear, however, that the application of mandamus to Uganda did not commence only

with the 1967 Act.

Yusufu Mutenda v. Zakaliya Mugnyiasoka, [1957] E.A. 393 per Lewis, J.:

“In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant a mandamus to compel the fulfilment.”

Moreover, “existing law” is preserved subject to its conformity with the Constitution of 1967 by art. 115 thereof.

The above extract is clearly founded on the English authorities. It may also be thought to be much in point in relation to the applicant’s unsatisfied judgment which has been rendered valueless by the refusal of the Treasury Officer of Accounts to perform his statutory duty under s. 20 (3) of the Government Proceedings Act. It is perhaps hardly necessary to add that the applicant has very much of an interest in the fulfilment of that duty.

Having explained the nature of mandamus and shown that it is a remedy which applied at common law and has been specifically applied by statute to Uganda it remains to decide what law ought to be applied in interpreting its scope and limitations under Uganda law.

Clearly, one must first look to Ugandan Statutes and decisions. Unfortunately, however, the remedy of mandamus is of very recent origin in Uganda and the local decisions are therefore not of much assistance. Indeed not a single East African decision was cited by either Counsel.

Since mandamus originated and was developed under English law it seems to me reasonable to assume that when the legislature in Uganda applied it to Uganda they intended it to be governed by English law in so far as this was not inconsistent with Uganda law. Uganda being a sovereign State I am certainly not bound by English law but for the reasons I have given I consider the English decisions must be of strong persuasive weight and afford guidance in matters not covered by Ugandan law.

I pass on to consider more specifically the two issues posed by the Solicitor-General for the respondent. I repeat the first issue:

Is this the class of case in which an order against the State or any of its servants can be made?

Before reviewing the English authorities it will be as well to clear up the manner in which powers formerly exercised by the Queen and the Crown became vested under the 1967 Constitution.

Article 122 of the Constitution provides in effect that powers and prerogatives personal to Her Majesty in respect of Uganda immediately before 9 April 1963 “shall vest in the President who, subject to the provisions of the Constitution, shall have the power to do all things necessary for the exercise or performance thereof”, and that all other powers and prerogatives vested in the Crown “shall vest in the Republic of Uganda”.

I think the crux of this issue is whether the Treasury Officer of Accounts when acting under the provisions of s. 20 (3) of the Government Proceedings Act is acting “simply in his capacity as a servant of the Republic” or whether he is performing “a duty of an imperative nature cast upon him by statute in the fulfilment of which duty the applicant has an interest as a subject of the State”. The English authorities are, I think, overwhelmingly to the effect that no order can be made against the State as such or against a servant of the State when he is acting “simply in his capacity of servant”. Thus, in *R. v. Secretary of State for War*, [1891] 2 Q.B. 326 mandamus was refused on the ground that no legal duty was imposed on the Secretary of State either by statute or by common law.

On appeal Lord Esher, M.R. agreed that a mandamus would not lie “on the ground that there is no legal duty towards the applicant, to do what the applicant asks us to direct him to do, imposed upon him either at common law or by Statute”. Kay, L.J., also pointed out that the Minister was acting under a royal warrant and as such was “only acting as agent for the Crown”. On further appeal to the House of Lords the decision was again upheld, Lord Blackburn saying that he rested his judgment on the short point that, on the construction of the warrant the Secretary of State was made “an agent of the Queen, subject to Her Majesty’s control and power . . .”

In the Divisional Court, however, these words were used by Charles, J., at p. 334:

“Now there are no doubt cases where servants of the Crown have been constituted by Statute agents to do particular acts, and in these cases a mandamus would lie against them as individuals designated to do those acts.”

Neither the appellate judges nor the Law Lords dissented from or cast any doubts upon this proposition. It is also, in my view in line with the definitions of both Earl Jowett and Lord Goddard on the nature of mandamus. I refer also to Halsbury’s Laws of England (3rd Edn.), Vol. II, at p. 99, under heading “Mandamus against the Crown and Crown Servants”,

“Where, however, government officials have been constituted agents for carrying out particular duties in relation to subjects, whether by royal charter, statute, or common law, so that they are under a legal obligation towards those subjects, an order of mandamus will lie for the enforcement of the duties. This remedy is expressly preserved by the Crown Proceedings Act, 1947.”

It should also be noted that the remedy is also preserved in identical terms to s. 40 of the Crown Proceedings Act, 1947, in our Government Proceedings Act s. 30 (3). In *R. v. Commissioners for Special Purposes of the Income Tax* (1888), 21 Q.B.D. 313, Lord Esher said, at p. 317:

“With regard to the question whether mandamus will lie, I am of the opinion that the case falls within the class of cases when officials have a public duty to perform, and having refused to perform it, mandamus will lie on the application of a person interested to compel them to do so.”

Lindley, J., agreed but added:

“It is no doubt difficult to draw the line, and some of the cases are not easy to reconcile . . .”

R. v. The Lords Commissioners of The Treasury (1872), L.R. 7, Q.B. 387 was one of such cases but seems to have been decided on the basis that the Lords of the Treasury received the money, which was granted to Her Majesty, as servants of the Crown, and no duty was imposed on them as between them and the persons to whom the money was payable. In the application presently before this Court no question of a grant of money is involved and we are concerned with a statutory duty to pay out of money to be provided by Parliament for the specific purpose.

Section 29 (1) of the Government Proceedings Act provides:

“Any expenditure incurred by or on behalf of the Government by reason of this Act shall be defrayed out of money provided by Parliament.”

It seems to me to be an illogical argument that the Government Accounting

Officer cannot be compelled to carry out a statutory duty specifically imposed by Parliament out of funds which Parliament itself has said shall be provided for the purpose.

There is nothing in the Government Proceedings Act itself to suggest that this duty is owed solely to the Government.

The Solicitor-General argued that s. 30 (3) must be read with s. 3. The latter section is, however, concerned only with “a claim against the Government”. This Court is concerned with a judgment debt. I respectfully agree with the views of all three judges of the Constitutional Court:

“I would say at once that I am in full agreement with the view put forward for Mr. Shah, that after the judgment of Sheridan, J., his contract had merged into, and had crystallised into something quite new, and the original contract as such had disappeared.” (Jones, J., P.).

“The applicant’s claim against the Government, by virtue of the judgment, is therefore now not on the contract, but on the judgment. The claim is now based on a debt of a court of record.” (Mead, J.).

“... the judgment debt in question ...” (Wambuzi, J.).

In *R. v. Registrar of Joint Stock Companies* (1888), 21 Q.B.D. 131 mandamus was refused “as there was another appropriate remedy”.

In *R. v. Bishop of Sarum*, [1916] 1 K.B. 466 the court held that there was not even a discretion to withhold mandamus if no other remedy remained.

The Solicitor-General conceded that if mandamus were refused, there was no other legal remedy open to the applicant. He also admitted that he had no alternative instructions as to the manner in which, if at all, the Government proposed to satisfy the applicant’s decree.

The nature of the interest required by an applicant for an order of mandamus was considered in *R. v. Manchester Corporation*, [1911] 1 K.B. 560. It was held that it was sufficient for the duty to be owed to the public at large. Avory, J., however, preferred to rely on the “true principle” laid down in *R. v. The Guardians of the Lewisham Union*, [1897] 1 Q.B. 498:

“The prosecutor (on a writ of mandamus) must be clothed with a clear legal and equitable right to something which is properly the subject of the writ, or a legal right by virtue of an Act of Parliament.”

In my view, the granting of mandamus against the Government would not be “to give any relief against the Government which could not have been obtained in proceedings against the Government”, contrary to s. 15 (2) of the Government Proceedings Act. What the applicant is seeking is not relief against the Government but to compel a Government official to do what the Government, through Parliament, has directed him to do.

Likewise, I do not consider there is anything in s. 20 (4) of this Act to prevent the making of such order. The subsection commences with the proviso “Save as is provided in this section”. The relief sought arises out of sub-s. (3), and is not “execution or attachment or process in the nature thereof”. It is not sought to make any person “individually liable for any order for any payment” but merely to oblige a Government officer to pay, out of funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament.

It was submitted for the State that the Treasury Officer of Accounts is not distinct from the State of which he is a servant. This, in my view, is a truism but it does not by any means necessarily follow that he cannot owe a duty to a

subject as well as to the Government which he serves. I even accept that he represents the Government, but it does not follow, in my view, that his duty is therefore confined to his Government employer.

Since the Attorney-General relied upon *The Judicial Review of Administrative Action* (2nd Edn.) by S. A. de Smith, it is appropriate to quote from this text book (p. 462) whilst noting that it is not a judicial authority:

“In mandamus cases it is recognised that when a statutory duty is cast upon a Crown servant in his official capacity and the duty is one owed not to the Crown but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of mandamus to enforce it.”

and again:

“Where, however, a duty has been directly imposed by Statute for the benefit of the subject upon a Crown servant as *persona designata*, and the duty is to be wholly discharged by him in his own official capacity, as distinct from his capacity as an adviser to or instrument of the Crown, the Courts have shown readiness to grant applications for mandamus by persons who have a direct and substantial interest in securing the performance of this duty.....It would be going too far to say, that whenever a statutory duty is directly cast upon a Crown servant that duty is potentially enforceable by mandamus on the application of a member of the public, for the context may indicate that the servant is to act purely as an adviser to or agent of the Crown, but the situations in which mandamus will not lie for this reason alone are, it is thought, comparatively few.”

Prem’s *Law of Writs in India, England and America* (2nd Edn.) at p. 385 says:

“Mandamus does not lie against a public officer as a matter of course. The courts are reluctant to direct a writ of mandamus against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in interference by the judicial department with the management of the executive department of the government. The courts will not intervene to compel action by an executive officer *unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory.*”

In my view on any reasonable interpretation of the duty of the Treasury Officer of Accounts under s. 20 (3) of the Act it cannot be argued that his duty is merely advisory, he is detailed as *persona designata* to act for the benefit of the subject rather than a mere agent of Government, his duty is clearly established and plainly defined, and the obligation to act is peremptory. In the words of Bray, J., in *R. v. Commissioners for Special Purposes of The Income Tax, ex parte Dr. Barnado’s Homes National Incorporated Association*, [1920] 1 K.B. 26 at p. 46:

“It may be that they are answerable to the Crown (in our case the Republic) but they are also answerable to the subject.”

Having been referred to the Public Finance Act (Cap. 149), I feel I must interpret the particular sections, 4 (1) and (3). I do not, however, feel that their provisions affect this application. They seem to me to be twofold. First, all Government officers handling Government moneys must obey Treasury instructions; secondly, the Treasury must not contravene the terms of private trusts.

It has never been pleaded or submitted that the Government accounting officers are obeying superior orders in their refusal to satisfy the decree. I refer to the relevant passage in the judgment of Jones, J., in his Constitutional Court judgment:

“This Court was not informed why Mr. Hitimana (The Treasury Officer of Accounts) refused to accept service of the document (the Court Registrar’s Certificate of Order against the Government), if he condescended to give any explanation at all, nor under whose instructions he was acting, that is if he was acting under any instructions from any superior officer.”

This Court would not feel itself entitled merely to assume, without any supporting evidence, that the Treasury or Cabinet or some other organ of Government had instructed one of its officers flagrantly to disobey a statutory duty which required him to carry out the instructions of its own High Court.

I find that this court has power to issue an order of mandamus.

I pass on to consider the Solicitor-General’s second issue:

Is the applicant in a position to ask this court to exercise its discretion in his favour?

I have already referred to the case of *R. v. Bishop of Sarum* when it was held that where there was no other remedy than mandamus open to the applicant the Court had no discretion to refuse the order. The facts in that case were concerned with ecclesiastical matters, not business, but the principle has been enumerated in others cases.

In *Re Nathan R. v. The Commissioners of Inland Revenue* (1884), 12 Q.B.D. 461, Brett, M.R., on appeal from a Divisional Court which had refused mandamus, on the ground that the correct remedy was by petition of right, said:

“The rule governing the discretion of the Queen’s Bench Division seems to me to have been clearly laid down by Lord Mansfield in *R. v. Bank of England* (1780), (2 Douglas 524 at p. 526). There he says ‘When there is no specific remedy, the court will grant a mandamus that justice may be done’. The construction of that sentence is this: where there is no specific remedy and by reason of the want of that specific remedy justice cannot be done unless a mandamus is to go, then a mandamus will go.”

The court’s concern “that justice may be done” and the applicant not left without any remedy is shown by the remarks of Bowen, L.J.; at p. 479 when he stressed that the Attorney-General had seen fit to give an assurance “in the clearest and most emphatic way, before us” that he would give his permission for a petition of right to issue. This procedure is now no longer used but it is not without significance to note that in granting such permission the Attorney-General did not certify that the subject had an enforceable right but merely wrote across the petition the single but impressive phrase, “FIAT JUSTITIA – Let justice be done”.

I have been unable to find many English authorities on the principles which the Court should adopt in deciding whether or not to exercise a discretion in favour of mandamus, assuming that there may be a discretion in this case. The English courts are always loath to “crib and confine” the exercise of a discretion. Viewed broadly however, I see no reason to disagree with an American court statement of principles to the effect that the court should take into account “a wide variety of circumstances, including the exigency which calls for the exercise of its discretion, the consequences of granting it, and the nature and extent of the wrong or injury which would follow a refusal . . . and it may be granted or

refused depending on whether or not it promotes substantial justice.” (*People v. Board of Education of City of Chicago* 323 U.S. 733).

The issue of discretion seems to me to depend largely on whether or not one should, or indeed can, look behind the judgment giving rise to the applicant’s decree. Whatever view I might be inclined to take as to the equity, business ethics, or morality of the applicant’s claim, it seems clear to me that I must carefully bear in mind that I am presently concerned, not with a contract, not with a claim, not even with a judgment, but with a judgment debt arising out of a decree awarded by this court to the applicant.

This High Court “cannot take upon itself the functions of an appellate court of fact, scrutinise the materials that were available . . . and substitute its own discretion and judgment . . .” (Prem’s Law of Writs in India, England and America (2nd Edn.) p. 418, penultimate paragraph).

It seems to me that this argument has added weight when one bears in mind that the judgment, although appealable, was not tested on appeal. In the words of Jones, J., therefore, the respondent must be presumed to have accepted it as “unassailable”, at any rate by the normal appeal procedure.

I have written a somewhat lengthy and detailed ruling in an attempt to do justice to counsels’ submissions and so that justice may not only be done but be seen to be done. At the risk, however, of being found wrong, if Government sees fit to test this ruling through normal appeal channels, I feel constrained to say that the issues appear to me to be fairly straightforward.

The applicant has a High Court decree against the Government. It was not appealed. An Act was passed with the object of avoiding either this particular decree or decrees of a like nature generally. The invalidating Act has itself been declared unconstitutional and invalid. The Government Proceedings Act lays down a clearly established and defined duty on the Government Accounting Officer requiring him to pay out the amount of the decree and costs. He has refused, without reason given, to comply with his statutory duty. The applicant seeks from this Court an order to compel the designated officer to carry out peremptory duty cast upon him by Statute.

I agree with Mr. Ponda’s closing submissions, which I think sum up admirably the consequences of this court refusing to grant an order of mandamus:

- (1) The applicant will have a paper decree of no value. The consequences of this would, in my view, be to lower the authority of this court and the confidence of the public in the effectiveness of its jurisdiction and orders.
- (2) The cardinal principle of equality before the law would be violated. This principle includes (inter alia), in the words of Mead, J., in his Constitutional judgment: “the fundamental right enshrined by art. 8 (2) (a) of the Constitution for every person in Uganda to the protection of the law.”

The judges are sworn to administer justice “without fear or favour” and to “uphold the Constitution”.

- (3) The court would be doing for the respondent what it has been held to be unconstitutional for it to attempt to do by legislation.
- (4) The court, at any rate if it refused its discretion to grant mandamus, would be substituting its own judgment for that of another judge with equal jurisdiction and powers in the same High Court, who expressly dealt with the points raised by the respondent as to why the judgment should not be granted to the present applicant.

An order of mandamus will issue as prayed with the costs of the application, including a certificate for two counsel, to the applicant.

Order accordingly.

For the applicant:

P. J. Wilkinson, Q.C. and V. N. Ponda (instructed by *Ponda, Asaria & CO.*,

For the respondent:

P. J. Nkambo-Mugerwa (Solicitor-General)

Income Tax v Diamond Corporation Tanzania Ltd
[1970] 1 EA 552 (CAD)

Division:	Court of Appeal at Dar es Salaam
Date of judgment:	9 June 1970
Case Number:	12/1970 (101/70)
Before:	Duffus P, Law and Mustafa JJA
Sourced by:	LawAfrica
Appeal from:	The High Court of Tanzania – Georges, C.J.

[1] Income Tax – Capital or Income loss – Loss on trading profits due to devaluation during year of income – Income loss.

[2] Income Tax – Profits of trade – Income accrued during accounting period kept in London – loss on devaluation a trade loss.

Editor's Summary

The respondent company, incorporated in Tanzania, bought diamonds from Williamson Diamonds Ltd., at a price 7 1/2 per cent below the price it obtained from its parent company in London. The 7 1/2 per cent commission was retained as a deposit with the parent company on a seven day call basis at a low interest rate. On making up its accounts to the end of 1967, the respondent showed the loss it had suffered on its deposit as a result of the devaluation of sterling as a trading loss. This was allowed in the High Court and the appellant appealed contending that the loss was a capital loss of part of an investment, and that the income should have been transferred to Tanzania as it was earned;

Held –

- (i) devaluation took place during the accounting year and the loss was a trading loss;
- (ii) the profits of a company can only be ascertained when the accounts are made up;
- (iii) the respondent was justified in keeping income out of the country during the year.

Appeal dismissed.

No cases referred to in judgment.

The following considered judgments were read.

Judgment

Mustafa JA: The facts in this appeal have been fully set out in the judgment of the Chief Justice of Tanzania. I will briefly summarise them; indeed the facts as such are not in dispute.

Williamson Diamonds Ltd. and its associated companies mine and produce diamonds in mainland Tanzania. Williamson Diamonds Ltd. market the gemstones through an organisation known as the Central Selling Organisation which operates in London and which controls about 85 per cent of the diamond trade in the world market. The Central Selling Organisation is composed of the Diamond Corporation Ltd. and its connected companies. The respondent company is registered as a limited liability company in Tanzania and is a fully owned subsidiary of the Diamond Corporation Ltd. which is a United Kingdom based company.

Before 1960 Williamson Diamonds Ltd. sold its gemstones to the Diamond Corporation Ltd. at a price which was less than that obtainable in the trade in

London. The profit thus made by the Diamond Corporation Ltd. was taxable in London. The respondent company was formed in or about 1961 and by agreement the respondent company was to buy diamonds produced by Williamson Diamonds Ltd. at a price 7 1/2 per cent below the best price available to the trade in London. The respondent company would sell all the gemstones it purchased from Williamson Diamonds Ltd. to the Diamond Corporation Ltd. at the best price available in the diamond trade. By this means the profit on the first sale of diamonds would be made by the respondent company and such profit would be taxable in Tanzania. In fact the respondent company was formed with that sole object in view.

In actual practice the diamonds are purchased directly from Williamson Diamonds Ltd. by the respondent company's parent company, the Diamond Corporation Ltd. Once the gemstones have been sorted and the valuation agreed, the Diamond Corporation Ltd., on behalf of the respondent company, sends a cheque for the agreed price and collects the stones. Simultaneously with the despatch of the cheque the Diamond Corporation Ltd., in its own books, credits the respondent company with a sum representing 7 1/2 per cent of the best price the stones would fetch in the market, this being the agreed percentage of profit the respondent company earns on its sale to the Diamond Corporation Ltd.

All transactions and dealings in respect of valuation, sale and purchase of the stones were in terms of pounds sterling. Prior to this dispute the respondent company with the approval and concurrence of the appellant, paid its income tax to the Crown Agents in London who remitted to the appellant. The accounting period for income tax purposes of the respondent is 1 January to 31 December each year.

Prior to 1967 the pound sterling was at parity with the Tanzanian pound. In November 1967 the pound sterling was devalued, while the Tanzanian shilling was not. At the end of December 1967 the respondent company had a credit balance with the Diamond Corporation Ltd. amounting to £1,249,346.19.5 sterling. This was made up of periodic credits due to the respondent in respect of the sale of diamonds during 1967.

At the end of December 1967 the respondent company made up its accounts for income tax for 1967. The accounts were expressed in Tanzanian shillings as tax liability has to be computed in Tanzanian currency. The respondent company claimed a loss of T. Shs. 3,579,140/- on its sterling holding as a result of the devaluation of the pound sterling. The appellant disallowed this item and taxed the respondent company on it. The respondent company successfully appealed to the High Court of Tanzania and from that judgment the appellant appeals to this court.

Counsel for the appellant submits that the respondent company is not entitled to deduct the loss as a result of devaluation from its trading profits in 1967. He maintains that the sum of £1,249,346.19.5 sterling was a capital account, and had become an investment. The said sum was deposited with the Diamond Corporation Ltd. during 1967 on a seven day call basis at a rate of interest 2 per cent below the normal bank rate. Counsel for the appellant submits that such a deposit alters the character of the money held, and since it was deposited for a certain period, however short, and was interest earning, it has assumed the character of an investment and therefore has become capital. He also argues that the respondent company was a dealer in diamonds and the loss in devaluation was not incurred in trading, that is, buying and selling of diamonds, nor had the loss anything to do with the production of income. The sum deposited was in respect of concluded trading transactions or business operations, and the income had been earned from concluded trading operations before devaluation, and the loss on devaluation was outside the trading activities of a diamond

merchant and dealer. He also submits that the respondent company was under no obligation to deposit and should not have deposited the profits earned with the parent company in London. The income could and should have been transferred, presumably as and when the amounts were credited, to Tanzania, in which case no loss due to devaluation would have occurred.

In my view the sums credited to respondent company by the Diamond Corporation Ltd. were trading receipts – profits earned in diamond trading. On the evidence adduced the respondent company was justified in keeping that money in sterling in London during each yearly accounting period, as all its dealings and transactions in respect of the diamond business were in sterling. The respondent company has certain legal and financial obligations in terms of the agreements entered into by it, although in practice it may never be called upon to perform them. I believe the respondent company was using the Diamond Corporation Ltd. as a banker, but because of the special relationship and arrangements between it and its holding company, the respondent company was paid interest at a rate 2 per cent less than the normal bank rate on its deposit. I do not think the money, by being deposited with the Diamond Corporation Ltd. in the way it was, has been converted into an investment of a capital nature. The money, which incidentally was of a large amount, was placed on a seven day call basis, and would retain its character of a current and liquid asset. Such a deposit with its holding company has always been regarded by the respondent company as a current, not a fixed asset, as all its balance sheets, both for 1967 and prior to 1967, show. These balance sheets were never questioned by the appellant. There is credible evidence, not challenged, that this would be in accordance with normal commercial accounting methods, and on the evidence adduced I am inclined to the view that it is so. It has not been shown there is any provision in the taxing legislation or regulations to the contrary.

As I have said the accounting period is from 1 January to 31 December each year. The devaluation of the pound sterling took place in November 1967, before the end of the accounting year. The respondent company could not finalise its accounts until the end of December 1967, and profits and losses can be computed only at the end of the accounting period, when the sum total of all the transactions can be worked out. It was in order for the respondent company to keep open and current its assets and liabilities until the end of the accounting year, and during such accounting period the respondent company deposited its money on a current basis with Diamond Corporation Ltd. Counsel for the appellant has stressed that the respondent company has agreed the deposit account was in respect of concluded trading transactions. True, but it is clear the respondent company can only mean isolated and individual transactions. The transactions as a series could only conclude at the end of December 1967, not in November 1967 when the pound sterling was devalued. In the respondent company's balance sheet and annual accounts for 1967 at p. 31 of the record item 1 of the notes on accounts reads:

- “1. These accounts are expressed in Tanzanian shillings. Diamond account transactions since the date of sterling devaluation and balances in the United Kingdom at 31 December 1967 have been converted at a standard rate of Shs. 17.12 to the £ sterling.”

This indicates there were transactions after November 1967 – the date the £ sterling was devalued. If the deposit was held over to the following year, after the end of the accounting period, say into 1968, I would have been prepared to agree with the proposition put forward by counsel for the appellant. But here devaluation took place at a point of time within the accounting period, and affected the respondent company's profits earned during that period. The loss,

if any, would be a trade loss. It means the profits earned by the respondent company do not represent that much in terms of Tanzanian shillings at the end of December 1967. The sum earned, which was in sterling, by the fact of devaluation, represented a lesser sum in terms of Tanzanian currency. The Chief Justice found that the respondent suffered a loss on devaluation. I am not sure if the loss is not merely a notional as opposed to a real loss. The sum earned in sterling has not decreased, only its convertibility value in terms of Tanzanian shillings has. In fact as Mr. Horton has testified, instead of showing the devaluation loss as a separate item, he could have represented it as a diminution in the value of the proceeds of sale of diamonds and put it in as a deduction from the diamond account figure, that is to say, instead of showing the diamond account as T. Shs. 24,176,100 he could have shown it as T. Shs. 20,596,960 – that is less the “loss” of T. 3,579,140, since £1,249,346 sterling, the actual sum earned by the respondent company, converted only amounts to T. Shs. 20,596,960. I cannot see how the appellant could complain if this were done, for as the Chief Justice said in his judgment –

“The appellant (i.e. the respondent in this appeal) company in fact does not pay its tax in East Africa. It has made arrangements to pay to the Crown Agents in London who remit. I understand that the Income Tax authorities would accept accounts made up in pounds sterling and would convert at the appropriate rate.”

If that were so, and the statement has not been challenged, it is clear that the respondent company was to pay tax on the equivalent amount of Tanzanian shillings for its profits in sterling.

Both counsel will forgive me if I do not refer to the authorities they have so extensively cited. In my view the cases quoted are not particularly in point, this case being, on the facts, clearly distinguishable from those authorities. I am of opinion the Chief Justice came to the right conclusion. I would dismiss the appeal with costs.

Law JA: I have had the advantage of reading in draft the judgment prepared by Mustafa, J.A. I agree with it entirely, and would only add a few words out of respect for the able arguments presented to us by Mr. Khaminwa for the appellant Commissioner-General of Income Tax.

I am unable to accept Mr. Khaminwa’s submission that the amounts credited to the respondent company in the books of the Diamond Corporation Limited lost their character of circulating capital or liquid assets from the fact of being placed on deposit at seven days’ call and from the fact that interest was paid on these deposits. A trading company’s profits and losses cannot be ascertained, as was pointed out by Romer, L.J. in *Golden Horse Shoe (New) Ltd. v. Thurgood* 18 T.C. 280 at p. 300 –

“... unless a comparison be made of the circulating capital as it existed at the beginning of the year with the circulating capital as it exists at the end of the year. It is, indeed, by causing the floating capital to change in value that a loss or profit is made.”

In my view, the sums credited to the respondent company from time to time in any one year in respect of the sale of diamonds constituted circulating capital until the close of the year when the accounts were made up and the profits allocated. The respondent company being a Tanzanian company, its profits had to be converted at the end of the year, into Tanzanian currency from sterling, to enable its liability to East African income tax to be assessed. It so happened that in 1967 the pound sterling was devalued but the Tanzanian shilling was not. The resulting loss to the respondent company had to be shown in its accounts.

This could be done in two ways, either by reducing the annual profits by the amount of the devaluation loss, or by showing that loss as a separate item of expenditure. The respondent company's accounts chose the latter method, as the loss was of a non-recurrent nature. It is not surprising that the Revenue authorities chose to regard this loss as an item of capital expenditure, not deductible in the computation of income tax. One must however have regard to the realities of the situation. The Chief Justice has found that, notwithstanding the way it was expressed in the accounts, the loss on devaluation represented a loss on the respondent company's trading capital, and not on its fixed assets, and that the loss was deductible from its trading profits for 1967. This is a finding of fact which should not be disturbed unless shown to rest on no evidence or no sufficient evidence or to be plainly wrong. As to this, Mr. D. Horton, a qualified and experienced accountant, deposed that the loss on devaluation, being an exceptional occurrence, was shown as a separate item but could equally well have been shown as a deduction from profits. He was emphatic that the credits deposited with the Diamond Corporation Limited in the course of a trading year represented current assets and had always been dealt with as such in the respondent company's accounts. The devaluation loss, in Mr. Horton's view, represented a diminution in the value of the proceeds of sales of diamonds in 1967 and was accordingly deductible from profits in the computation of liability to East African income tax. The Chief Justice accepted this evidence, and the appellant called no evidence to rebut it. In cases of this nature, regard must be had to the ordinary principles of commercial accounting and as Lord Halsbury said in *Gresham Life Assurance Society v. Styles*, [1892] A.C. 309, quoted with approval by Lord Hanworth, M.R., in *Naval Colliery Co. Ltd. v. Commissioners of Inland Revenue* 12 T.C. 1017 –

“Profits and gains must be ascertained on ordinary principles of commercial trading.”

The evidence as to these ordinary principles adduced before the Chief Justice amply supports his findings that the deposits credited to the respondent company in the Diamond Corporation Ltd.'s books in the course of the trading year 1967 represented trading capital, and that the loss consequent upon devaluation was a trading loss deductible for income tax purposes from the computation of the respondent company's profits for the year 1967. For these reasons I agree that this appeal fails, and I concur in the order proposed by Mustafa, J.A.

Duffus P: I have read the draft judgments of Mustafa and Law, JJ.A. I entirely agree with their conclusions and accordingly the appeal will be dismissed with costs.

Appeal dismissed.

For the appellant:

J. M. Khaminwa (Counsel to the East African Community)

For the respondents:

S. H. M. Kanji and R. W. Moisey (instructed by *Fraser Murray, Roden & Co.*, Dar es Salaam)

Kitundu Sisal Estate v Shingo and others
[1970] 1 EA 557 (CAD)

Division:

Court of Appeal at Dar es Salaam

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Date of judgment: 22 June 1970
Case Number: 54/1969 (105/70)
Before: Duffus P, Law and Lutta JJA
Sourced by: LawAfrica
Appeal from: The High Court of Tanzania – Biron, J.

[1] *Civil Practice and Procedure – Revision – Ruling not being a decree – Revision applicable – Civil Procedure Code, s. 79 (T.).*

[2] *Master and servant – Summary dismissal – Jurisdiction – Claim for dismissal without notice – Court without jurisdiction – Security of Employment Act (Cap. 574), s. 28 (T.).*

Editor’s Summary

Action was brought in the District Court on behalf of employees of sisal estates claiming that their services had been wrongfully terminated without notice. Objection was taken by the defendants that the court had no jurisdiction to hear a suit concerning summary dismissal because of the Security of Employment Act, s. 28 (1). The magistrate held that he had jurisdiction as the claim was not based on summary dismissal. The High Court was asked to revise this ruling under the Civil Procedure Code, s. 79, but held that the magistrate’s ruling was not a case decided within that section. The appellants appealed:

Held –

- (i) all decrees are appealable as of right and therefore the words “case which has been decided” must be given a wider meaning that “decree” (*Gurdevi v. Mohamed Bakhish* (2) and *Rothblum v. Ebrahim Hajee Ltd.* (4) followed);
- (ii) the magistrate’s order was one subject to revision;
- (iii) the claim was founded on dismissal without notice which is summary dismissal and the magistrate therefore had no jurisdiction to try the case.

Appeal allowed.

Cases referred to in judgment:

- (1) *Vithaldas Jetha v. Valibhai* (1935), 1 T.L.R. (R) 400.
- (2) *Gurdevi v. Mohamed Bakhish* (1943), A.I.R. 30 Lahore 65.
- (3) *Muhinga Mukoni v. Rushwa Co-operative Society*, [1959] E.A. 595.
- (4) *Rothblum v. Ebrahim Hajee Ltd.*, [1963] E.A. 47.
- (5) *Patel v. Benbros Motors Tanganyika Ltd.*, [1968] E.A. 460.

The following considered judgments were read.

Judgment

Law JA: This appeal arises out of a civil suit filed on 9 March 1968, in the District Court of Lindi District, by three named plaintiffs purporting to sue on their own behalf and on behalf of 259 other persons, all described as workers on three sisal estates, against those estates. The cause of action was defined in paragraph 5 of the amended plaint as follows –

“The plaintiffs state that on 16 June 1967 their services were wrongly terminated without notice although they were paid severance allowance.”

and they claimed Shs. 47,030 being “the total of their one month pay in lieu of

one month notice”. Amended defences were then filed on behalf of the three defendants.

When the suit came for hearing the various technical defences were raised as preliminary objections but were over-ruled by the resident magistrate who expressed the view, with which I have considerable sympathy, that in employment matters undue regard should not be had to the stringent rules of civil procedure, and that the suit should be heard on its merits as expeditiously as possible. The point was then taken that by reason of s. 28 of the Security of Employment Act, (Cap. 574) the court had no jurisdiction to entertain the suit. Subsection (1) of that section reads –

“28(1) No suit or other civil proceedings (other than proceedings to enforce a decision of the Minister or the Board on a reference under this Part) shall be entertained in any civil court with regard to the summary dismissal or proposed summary dismissal or a deduction by way of a disciplinary penalty from the wages of an employee.”

The resident magistrate, in a carefully considered and reasoned ruling, held that the jurisdiction of his court was not ousted by s. 28 because “the plaintiffs themselves have never contended that they were summarily dismissed”. He held that the court in this case was “only called upon to decide whether the plaintiffs’ services were terminated in circumstances entitling them to claim one month’s pay in lieu of notice or not” and he accordingly held that he had jurisdiction to entertain the suit. With respect, I cannot agree. Summary dismissal means dismissal without notice, and the plaintiffs’ contention that their services were wrongly terminated without notice can only, in my view, be construed as a contention that they were summarily dismissed. This being so, and the summary dismissals having taken place after 1 May 1965 (the date when the Security of Employment Act came into operation), s. 28 of that Act had the effect, in my opinion, of excluding the suit the subject of this appeal from the jurisdiction of the courts; see *Patel v. Benbros Motors Tanganyika Ltd.*, [1968] E.A. 460.

The magistrate’s ruling was embodied in a formal order dated 22 June 1968 worded as follows –

- “(1) the Court has jurisdiction to try the suit;
- (2) this suit has not been wrongly brought under s. 138 of the Employment Ordinance and all conditions in that section have been complied with.”

On 6 September 1968, the three defendant companies filed a petition in the High Court for a revision of the above order on the following grounds –

- “(1) The learned magistrate erred in holding that his court had the jurisdiction to entertain the suit or the civil proceedings filed by the respondents against the petitioners with regard to the wrongful termination of the respondents’ services by the petitioners on 16 June 1967, and thus proceeded to exercise jurisdiction not vested in him by law.
- (2) In the alternative, the learned magistrate acted without jurisdiction in permitting one plaint to be filed in respect of wages claimed against three separate employers by their respective employees.”

The petition came for hearing before Biron, J. on 5 August 1969, and was dismissed by the judge because in his view the magistrate’s ruling giving rise to the order of 22 June 1968, did not constitute a “case decided” within the meaning of s. 79 of the Civil Procedure Code, so that the petition was incompetent. From this decision the three defendant companies, to whom I shall henceforth refer as the appellants, have with leave brought the present appeal.

The main ground of appeal is that the judge erred in holding that the magistrate's ruling on the preliminary point as to jurisdiction did not amount to a "case decided" within the meaning of s. 79 aforesaid. That section reads, so far as it is material –

"79(1) The High Court may call for the record of any case which has been decided by any court subordinate to the High Court and in which no appeal lies thereto, and if such subordinate court appears –

- (a) to have exercised a jurisdiction not vested in it by law; or
- (b) to have failed to exercise a jurisdiction so vested; or
- (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit."

It is unfortunate that the judge was not referred to the numerous and conflicting reported decisions from the courts of Tanganyika on this point. Several of them are referred to in *Rothblum v. Ebrahim Hajee Ltd.*, [1963] E.A. 47. For many years the courts in Tanganyika followed the decision in *Vithaldas Jetha v. Valibhai* (1935), 1 T.L.R. (R) 400 that the High Court had no jurisdiction to revise interlocutory orders which do not decide the suit itself. In 1959 Davies, C.J. in *Muhinga Mukoni v. Rushwa Co-Operative Society*, [1959] E.A. 595 preferred to follow *Gurdevi v. Mohamed Bakhish* (1943), A.I.R. 30 (Lahore) 65, in which a strong court held that interlocutory orders which are not purely formal or incidental are revisable. In my view the words "any case which has been decided" do not mean the same as "any suit which has been decided", because they are governed by the words which follow "and in which no appeal lies". A suit which has been decided ends with a judgment and decree, and all decrees in a subordinate court are appealable, except a consent decree (see s. 70 of the Civil Procedure Code). I agree therefore with Sir Ronald Sinclair, P. when he said in *Rothblum's* case at p. 51 that the word "case" in s. 79 of the Code is a word of wide import which must be given a wider meaning than "suit", and the test is not whether the order sought to be revised is an interlocutory order, but whether it is an order deciding a case. The order, the subject of this appeal, would have decided a case, had the magistrate found, as in my opinion he should have found, that he had no jurisdiction to entertain the suit. The suit would have been dismissed. The fact that the magistrate decided the issue in the opposite sense does not, in my view, make it any less of a case which has been decided. The issue as to jurisdiction was contested as a matter separate and distinct from the suit. It could have disposed of the suit. It resulted in a carefully considered ruling from which an order was extracted. That order was not appealable, either under s. 74 of the Code, or under O. 60, nor was it a purely formal or incidental order. In my view an objection to jurisdiction, tried as a preliminary issue separately from the suit, with the decision made the subject of an order, is "a case which has been decided" within the meaning of s. 79 of the Code and is subject to the High Court's revisionary powers. I have therefore come to the conclusion that the judge was in error in holding that the magistrate's ruling and the consequent order did not arise out of "a case which has been decided". This conclusion does not however dispose of the appeal. Although the judge was in my view wrong in holding that the application for revision was incompetent, it does not follow that he would necessarily have revised the proceedings in the lower court had he entertained the application. Whether or not to exercise the revisionary powers conferred by s. 79 of the Civil Procedure Code is a matter within the High Court's discretion. The judge in his ruling which is the subject of this appeal gave a strong indication that he would have exercised his discretion against the appellants. He said –

“Even if I considered that the court had jurisdiction, I am far from inclined to exercise it, as I feel that the case should be decided on its merits.”

In expressing this view, the judge cannot have had in mind s. 28 of the Security of Employment Act (Cap. 574) to which reference has been made earlier in this judgment. The record of the proceedings before the judge indicates that this provision was not brought to his notice. By s. 28 aforesaid a suit with regard to the summary dismissal of an employee is expressly excluded from the jurisdiction of all civil courts. The proceedings which the judge was invited to revise arose out of a suit with regard to the summary dismissal of employees. The Lindi District Court had accordingly no jurisdiction to entertain the suit. Had the judge appreciated this fact, he could not in my view have refused to exercise his discretion to revise the proceedings, nor could he have expressed the view that the suit should be heard on its merits. It is unthinkable that a court should be allowed to hear a suit which the legislature has expressly withdrawn from that court’s jurisdiction. In my view this appeal must succeed. I would set aside the judge’s order that the petition be dismissed, and substitute an order that the petition be allowed and that the president magistrate at Lindi be ordered to reject the plaint in Employment Ordinance Civil Case No. 2 of 1968 and dismiss that suit, on the grounds that the District Court at Lindi has no jurisdiction to entertain that suit.

The respondents were not represented at the hearing of this appeal. I am grateful to Mr. N. M. Patel, who appeared for the appellants, for his full, fair and able presentation of all aspects of the matter. Mr. Patel very rightly did not press for costs, and I would accordingly allow this appeal but make no order as to costs.

Duffus P: This appeal concerns the power of the High Court to make an order for revision under s. 79 of the Civil Procedure Code, 1966, on a decision in the magistrate’s court. This was a case from the Lindi District Court in which there were three plaintiffs acting on behalf of 259 other workers who all claimed from the appellants, three sisal estates, one month’s wages on the ground that their services were terminated without notice. The appellants took the preliminary objection that the magistrate’s court had no jurisdiction by virtue of s. 28 of the Security of Employment Act 1964 (Cap. 574), which provided, *inter alia* –

“28(1) No suit or other civil proceeding (other than proceedings to enforce a decision of the Minister or the Board on a reference under this Part) shall be entertained in any civil court with regard to the summary dismissal or proposed summary dismissal of an employee.”

In a considered decision the magistrate dismissed the preliminary objection and ordered the action to proceed.

The appellate presented a petition to the High Court asking for the decision to be revised by virtue of s. 79 of the Civil Procedure Code. The judge of the High Court before whom the matter was brought, held that the magistrate’s order did not come within the scope of s. 79 and that therefore the petition was incompetent and he dismissed it. He also stated that even if he had jurisdiction he would not be inclined to exercise his discretion in this case. This appeal was brought to this court by leave of the judge of the High Court. The relevant portion of s. 79 states:

- “(1) The High Court may call for the record of any case which has been decided by any court subordinate to the High Court and in which no appeal lies thereto, and if such subordinate court appears –
 - (a) to have exercised a jurisdiction not vested in it by law; or

- (b) to have failed to exercise a jurisdiction so vested; or
 - (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,
- the High Court may make such order in the case as it thinks fit.”

I have had the advantage of reading the judgment of Law, J.A. in draft. Section 79 is most unhappily worded and has, as a result, been the subject of numerous decisions of the High Court and of this court. I agree with Law, J.A. that this section cannot be interpreted as meaning the final decision of an action, if it did, the section would be meaningless as the final decision on any action can always be the subject of an appeal but s. 79 only applies if it is a decision from which no appeal can be brought.

I would refer here to the judgment of the full Bench of the High Court of Lahore in the Indian case of *Gurdevi v. Mohamed Bakhish* (1943), A.I.R. 30 Lahore 65. Section 115 of the Indian Civil Procedure Code is similar to our section and with respect I agree with Bhide, J. when he said –

“I would accordingly hold that from the standpoint of language alone, the word ‘case’ is wide enough to include decision on any matter in controversy affecting the rights of the parties to a suit. This interpretation is supported by the dictionary meaning of the word, by the sense in which it is used in some other sections of the Code itself and by the rule of interpretation which requires that a beneficial construction should be placed upon the provisions of a statute, when this appears to be consonant with its object. The main objection to this wide interpretation seems to be the feeling that it may cause great inconvenience to the parties by delay in the disposal of suits by petitions for revision. But this objection loses its force when it is remembered that the exercise of the revisional powers under s. 115, Civil P.C., is subject to two-fold restrictions. Firstly, there are the various restrictions expressly mentioned in the section itself. Secondly, there are other implied restrictions which are to be deduced from the very nature of the extraordinary jurisdiction under s. 115, Civil P.C., as pointed out above. In view of these implied restrictions, the High Court will not be justified in interfering in revision unless (i) the decision relates to a substantial question of controversy between the parties which is of such a nature that it will result in a ‘grave wrong’ and ‘defeat of the law’, and unless (ii) such ‘grave wrong’ or ‘defeat of law’ cannot be prevented or remedied except by interference in revision – either because there is no other remedy or the remedy is too remote or cumbersome to be of any practical utility in the particular circumstances of the case.”

Section 79 was considered by this Court in the case of *Rothblum v. Ebrahim Hajee Ltd.*, [1963] E.A. 47, and in his judgment Sir Ronald Sinclair, P., said at p. 51 –

“There is no definition of ‘case’ in the Code. It is a word of wide import and should, I think, be given a wider meaning than ‘suit’. I do not think it would be profitable to embark on an investigation as to the meaning of an interlocutory order. The words ‘interlocutory order’ do not appear in s. 115 and I prefer to adhere to the words of the section which falls to be interpreted and to decide, not whether the order now sought to be revised is an interlocutory order, but whether it is an order deciding a case. The proceedings in question were instituted after the suit had been decided and a decree issued. They were separate and distinct proceedings. Giving the word ‘case’ a wide meaning, as I think I must, the proceedings in my view constitute a ‘case’ and the order setting aside the ex parte decree the ‘decision of a case’ within the meaning of s. 115.”

I agree that this court should not attempt to lay down any general rule as to what “decisions” come within the meaning of the provisions of s. 79 but should deal with the particular facts of each case. I agree with Law, J.A., that the magistrate’s decision in this case is a decision which comes within the purview of s. 79 and one which the High Court has power to revise. I agree also that the other provisions of s. 79 apply to this case. This is not a case in which an appeal would lie against the decision of the magistrate and it is clearly on a question of jurisdiction.

Further, I entirely agree with Law, J.A. that s. 28 of the Security of Employment Act applies in this case and that accordingly the magistrate had no jurisdiction to hear and deal with this matter. I also agree that the judge of the High Court should have allowed the petition and revised the decision of the magistrate and that this is a proper case in which this court should now act and make the necessary order.

I agree with the order suggested by Law, J.A. and as Lutta, J.A. also agrees there will be an order accordingly.

Lutta JA: I have had the advantage of reading in draft the judgments of my Lord the President and Law, J.A., with which I am in full agreement and I have nothing to add.

Appeal allowed.

For the appellants:

N. M. Patel (instructed by *Donaldson & Wood*, Dar es Salaam)

The respondents were absent and unrepresented.

Settlement Fund Trustees v Nurani
[1970] 1 EA 562 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	3 July 1970
Case Number:	17/1970 (106/70)
Before:	Spry VP, Law and Lutta JJA
Sourced by:	LawAfrica
Appeal from:	The High Court of Kenya – Harris, J.

[1] *Contract – Novation – Agreement to assume obligations necessary.*

[2] *Land – Restrictive covenant – Running with land – Land must be retained by covenantee.*

[3] *Land – Licence – Right to enter and remove crop a licence.*

[4] *Sale of goods – Crop – Industrial growing crop agreed to be severed under the contract of sale – Sale of Goods Act (Cap. 31), s. 2 (K.).*

[5] Trust and trustee – Purchase of land subject to trust to knowledge of purchaser – Purchaser a trustee.

Editor's Summary

The respondent bought from the owner of certain land the bark of wattle trees growing on her land together with the right to remove it within a limited period. The owner sold the land to the appellants who had knowledge of the sale of the wattle bark. The appellants resold the land without reference to the prior sale of the bark and the new owner prevented the respondent from removing the bark. The respondent sued the appellant claiming that the appellant had been substituted for the owner by novation and that the appellant held the bark in trust for the respondent. The trial judge found for the respondent on the benefit of a restrictive covenant under the doctrine of *Tulk v. Moxhay* (3).

The appellant appealed, contending that *Tulk v. Moxhay* (3) did not apply,

that the contract was void as an unregistered agreement for an interest in land and was not a sale of goods;

Held –

- (i) the doctrines of *Tulk v. Moxhay* (3) did not apply as it depends upon the retention by the covenantee of a dominant tenement;
- (ii) the wattle bark was an industrial growing crop agreed to be severed under the contract of sale and so constituted goods (*Marshall v. Green* (6) followed);
- (iii) the right of entry to remove the bark was a temporary licence not creating an interest in the land;
- (iv) there was no agreement by the appellants to assume the obligations of the owner under the contract and there can therefore be no novation;
- (v) the owner of the land was trustee for the respondent of the wattle bark and as the appellants bought with knowledge of the trust, they assumed the character of trustee previously held by the owner.

Appeal dismissed.

Cases referred to in judgment:

- (1) *Scorel v. Boxall* (1827), 148 E.R. 724.
- (2) *Wilson and Another v. Coupland and Another* (1821), 106 E.R. 1176.
- (3) *Tulk v. Moxhay*, [1843-60] All E.R. Rep. 9.
- (4) *Pooley v. Budd* (1851), 51 E.R. 200.
- (5) *Rolfe v. Flower* (1865-7), 1 L.R. P.C. 27.
- (6) *Marshall v. Green* (1875), 1 C.P.D. 35.
- (7) *Re Conner, exp. Rivolta* (1882), W.N. 76.
- (8) *Re Blundell, Blundell v. Blundell* (1889), 40 Ch. D. 370.
- (9) *Fitzgerald v. Firbank*, [1895-9] All E.R. Rep. 445.
- (10) *Formby v. Barker*, [1900-3] All E.R. Rep. 445.
- (11) *Oughtred v. Inland Revenue Commissioner*, [1959] 3 All E.R. 623.
- (12) *Re United Railways of Havana and Regla Warehouses Ltd.*, [1960] Ch. 52.
- (13) *Clarke v. Sondhi Ltd.*, [1963] E.A. 107.
- (14) *Nurdin Bandali v. Lombank Tankanyika*, [1963] E.A. 304.

The following considered judgments were read.

Judgment

Lutta JA: This is an appeal by the defendant from a judgment of the High Court in a suit in which the plaintiff had claimed a total sum of Shs. 38,355/- as damages for breach of contract, or, in the alternative,

for breach of trust by the defendant. The facts are that the respondent entered into an agreement (to which I shall refer as “the agreement”) in writing with one Mrs. Jessica Eileen Marian Dickson (hereinafter referred to as “the vendor”) on 28 May 1962 under which the rights of cutting and taking bark from wattle plantations on the vendor’s farm at Eldoret (hereinafter referred to as “the land”) were sold to the respondent for Shs. 17,876/-. It was also provided in the agreement, that for the purpose of exercising those rights, the respondent should have a right of entry on to the land until 31 December 1963. Pursuant to the agreement the respondent in the first half of 1963 entered on to the land to erect huts and latrines for the use of his labourers. During this period the vendor was negotiating the sale of the land to the appellants. On 8 August 1963 Messrs. Shaw and Carruthers, advocates for the vendor and respondent (to whom for convenience, I shall refer as “the advocates”) wrote to the Senior Executive Officer, Compassionate Farms, Central Land Board, Nairobi (hereinafter referred to as “the appellants”) as follows:

“The Senior Executive Officer,
Compassionate Farms,
Central Land Board.

Dear Sir,

We refer to our letter to you of the 2nd instant written on behalf of Paulo Kibor arap Kemboi who is interested in purchasing the farms being acquired from Mrs. Dickson, namely L.R. Nos. 8746 and 10324. We enclose herewith recommendation from the District Agricultural Officer, Nandi.

We understand that your Mr. Knight called to see the writer regarding L.R. Nos. 8746 and 10324 with regard to Mr. Nurani’s purchase of the wattle on the farm while Mrs. Dickson was in possession. We confirm that Mrs. Dickson did sell the wattle to Nurani on the 28th May 1962.

Yours faithfully,

SHAW & CARRUTHERS”

On 15 August 1963 the appellants replied to the above as follows –

“Shaw & Carruthers,

Dear Sir,

L.R. Nos. 8746 & 19324

Mrs. J. Dickson

Thank you for your above letter and the enclosed recommendation concerning Mr. Kibor. His name has been added to the waiting list and I will write to you concerning the resale of this farm after it has been advertised.

I have noted on the valuation report for this farm that the sale of the wattle to Mr. Nurani is for the bark only and the ‘Kuni’ will belong to this Board. Can you please confirm that this is the true position?

Yours faithfully,

Senior Executive Officer

(Compassionate Farms)”

On 17 August 1963 the appellants made an offer to purchase the land and on 20 August 1963 the advocates wrote confirming that the sale of the wattle to the respondent was for bark only and the trees and brushwood remained the property of the vendor. On 28 August 1963, the vendor, through the advocates, wrote to accept the offer made by the appellants for the purchase of the land and forwarded the title deeds thereof to the Registrar of Titles. In the same letter the appellants were asked to note that the wattle was excluded from the sale. However, on 5 September 1963, the appellants wrote to the advocates pointing out that it was the bark of the wattle trees that had been excluded from the sale of the land.

The land, among others, was advertised for sale in the East African Standard of Friday 13 September 1963. The advertisement contained, inter alia, the following information –

“Particulars of Farm:

L.R. No. 10324 and 8746

Acreage: 343.

Particulars: 75 acres wattle.....

Sale price: £5,300”

This advertisement made no reference to the fact that the wattle bark had been sold.

On 16 October 1963, the advocates wrote to the appellants as follows –

“The Senior Executive Officer,
Compassionate Farms,
Central Land Board.
Dear Sir,

Mr. N. I. Nurani has requested us to obtain from you a letter confirming that the wattle bark on L.R. Nos. 8746 and 10324 is his property. Please let us have the necessary letter.

Yours faithfully,
SHAW & CARRUTHERS”

On 17 October 1963, the appellants wrote to Mr. Paulo Kibor arap Kemboi (to whom I shall refer as “the purchaser”) offering to sell to him the land which the vendor had already sold to them. In this letter the bark of the wattle trees was not excluded from the sale. The purchaser accepted the offer through the advocates on 22 October 1963. It is necessary to point out that the advocates were acting for the vendor, the respondent and the purchaser.

The purchaser entered into possession of the land on 23 October 1963, and according to the advocates’ letter of 30 November 1963, he was informed that the goods had already been sold to the respondent. That letter reads as follows.

“Mr. Paulo arap Kemboi,
Copy to: The Senior Executive Officer,
Compassionate Farms,
Central Land Board.

30 November 1963.

Dear Sir,

L.R. Nos. 8746 & 10324

We have been informed by Mr. N. I. Nurani that you have entered into an agreement for the sale of wattle on the above farms.

As you are aware, this wattle is not your property, it having been previously sold to Mr. N. I. Nurani, and you were informed of this when you took over the farm.

Yours faithfully,
SHAW & CARRUTHERS”

Notwithstanding this letter attempts thereafter by the respondent to enter the land for purposes of cutting and stripping the bark of the wattle trees were unsuccessful, the purchaser having prevented him from doing so.

On 29 October 1963 the appellants replied to the advocate’s letter of 16 October 1963 in the following terms –

“Dear Sirs,

Ref.: Your letter GHC/DE 4322 dated 16th instant.

Thank you for your letter.

I herewith confirm the wattle bark on farm L.R. 8746 and 10324 has been purchased by Mr. N. I. Nurani and forms no part of the assets which this Board includes in its purchase of this property, but the trees after

having been stripped of their bark remain the property of the registered owner.

Yours faithfully,

(H. Goldsworthy),

for SECRETARY”

It is not disputed that the bark of the wattle trees (to which I shall refer as “the goods”) in question was ripe enough during this period (May 1962 and December 1963) for cutting and stripping. The purchaser entered into a contract with other persons for the sale of the wattle in November/December 1963. The respondent, until March 1964 attempted, in vain, to have access to the land in order to remove the wattle bark or to obtain compensation from the appellants for the loss of the cutting rights and in April 1967, filed a suit against the appellants claiming damages for breach of contract, or in the alternative, for breach of trust. The judge gave judgment in favour of the respondent for the loss of the original purchase price and damages. In that judgment the judge found that the goods constituted “goods” within the meaning of s. 2 (1) of the Sale of Goods Act (Cap. 31) and that failure to register the agreement under the Registration of Titles Act (Cap. 281) did not affect its validity. He further found that the appellants were in breach of their contractual obligation to the respondent. From that decision the appellants lodged an appeal and the respondent has cross-appealed with a view to supporting the decision of the judge on the grounds that the appellants were trustees for the respondent in respect of the said goods and they were estopped from denying that they were bound by the agreement. At the hearing of this appeal, we gave leave to Mr. Slade, counsel for the respondent, to amend his notice of cross-appeal to include an additional ground, namely, that there was novation of the contract “in such manner that the appellant took the place of Mrs. Dickson (the vendor) for all purposes of the contract”.

As I understand it, the argument of Mr. Morrison, for the appellants, is, firstly, that the agreement is an interest in land and as it was not registered under s. 32 of The Registration of Titles Act it was not effectual to pass interest in the land to the respondent and was accordingly void. Secondly, he argues that in the agreement it was stipulated that the rights conferred on the respondent would endure for a fixed period, that is, for over a year, and thus the goods were fructus naturales and not fructus industriales and accordingly the sale of the rights in respect thereof was not a sale of goods within the meaning of the Sale of Goods Act and therefore the test laid down in *Marshall v. Green* (1875-6), 1 C.P.D. 35 should not have been applied by the judge to the instant case. For this proposition he relied on the case of *Scorel v. Boxall* (1827), 148 E.R. 724. Thirdly, Mr. Morrison, relying on the case of *Fitzgerald v. Firkbank* [1895-9], All E.R. Rep. 445, argues that the respondent’s rights under the agreement were in the nature of profits à prendre and did not constitute just a mere revocable licence and since the agreement was not under seal or not a deed it would have to be converted into a registrable instrument and registered under the Registration of Titles Act otherwise it would not be effective against a purchaser without notice. Fourthly, he argued that on the basis of the agreed facts novation of contract could not be inferred. He submitted that there was no release of the vendor from the agreement and that no consideration was given by the appellants. Fifthly, Mr. Morrison, relying on the case of *Re Blundell, Blundell v. Blundell* (1889), 40 Ch.D. 370, argues that as the appellants were strangers to the agreement, they did not assume the burden of the trust of the goods for the respondent as a result of the agreement nor could that burden be imposed on them. Lastly, he argues that the appellants were not by their action or conduct estopped from denying that the land was transferred to them subject to the trust of the goods for the respondent. He bases his argument on the case of *Nurdin Bandali v. Lombank Tanganyika*, [1963] E.A. 304. Mr. Slade, for the respondent, submitted that by reason of clause 17 of the agreement no interest in the land was created and that in any event, failure to register the agreement under s. 32 of The Registration of Titles Act could not defeat the contractual rights of the respondent which he had acquired under the agreement. He referred us to the case of *Clarke v. Sondhi Ltd.*, [1963] E.A. 107 and urged that the principle laid down in that case

ought to be applied to the instant case. Referring to the definition of the term “goods” in s. 2 of the Sale of Goods Act he submitted that that definition applied to the goods in the instant case.

With regard to the question as to whether by novation, the appellants entered into a contract with the respondent by which the vendor extinguished her obligation to the respondent and assigned or transferred it to the appellants, Mr. Slade argued that consent of the parties should be inferred from their conduct. He contended that consent of the appellants to accept responsibility for the sale and delivery of the goods to the respondent should be inferred from the letter of 29 October 1963, consideration being the release of the vendor and the payment of a lesser price.

Mr. Slade further submitted, relying on the case of *Marshall v. Green* (supra) that the test therein applies to the instant case as the land was in the nature of a warehouse for the wattle trees during the material period, that is, 28 May 1962 to 31 December 1963. He argues that the respondent did not derive any benefits from the land during the material period and that in any event property in the said goods could only have passed to the respondent on their severance. In other words, property in the goods remained that of the vendor or her successors in title and that as the vendor has been paid the purchase price in full, she became a trustee of the goods for the respondent and her successors in title. He contends therefore that the appellants became constructive trustees of the goods for the respondent. He referred to the case of *Oughtred v. Inland Revenue Commissioners*, [1959] 3 All E.R. 623, to support this proposition. He further contended that the letter from the Secretary of the appellants dated 29 October 1963 to the advocates amounted to a declaration of a constructive trust, if not an acknowledgement thereof. That is, that the appellants expressly recognised the existence of and took over the constructive trust. He asked us to give a meaning to that letter and submitted that only two meanings could be given to it; it was either a novation of contract or a declaration of a trust.

It seems to me that the first question to be decided is whether the agreement was a contract for the sale of goods or a contract for the sale of an interest in land and therefore required registration. In answering this question it is necessary to consider Mr. Morrison’s second argument that the goods were fructus naturales as opposed to fructus industriales. The judge found that the test laid down in *Marshall v. Green* (supra) applied to the instant case and held that the goods were “goods” within the meaning of the Sale of Goods Act and that the agreement was “a contract for the sale of goods within the contemplation of that Act and is to be construed in accordance with the Act”. What right over the land did the respondent have? He had the right to enter the land for the specific purpose of cutting and stripping the goods up to 31 December 1963. That right was limited to, as clause 1 of the agreement provides, “bark only, the trees and brushwood shall remain the property of the owner”. In other words, that right was limited to the producer of the wattle trees which stood on the land. Besides that right the respondent had nothing else to derive from the land – no benefit of any kind was to be derived from the land by him during the period between 28 May 1962 and 31 December 1963. In my view the agreement conferred on the respondent only the right to enter and cut and strip so much of the goods as has been produced by the wattle trees comprised in 715 acres on the land by or during the material period. That is what was contracted for between the vendor and the respondent. No interest in the land was conferred on the respondent under the agreement. I think the case of *Scorel v. Boxall* (supra) can be distinguished in its details from the instant case. Briefly, in that case, there was an action of trespass by the purchaser of standing trees, which were to be cut by the purchaser, and the question was, whether a mere verbal contract for the sale of such trees gave such possession to the purchaser as would entitle

him to maintain trespass against the defendant for cutting and carrying the trees away. It was held in that case that the contract was for the sale of an interest in land and therefore it ought to have been in writing to give any interest to the purchaser. In the instant case, the agreement was for the bark which had been produced by the wattle trees and was to be cut and stripped or severed from the trees. It was not the standing wattle trees which were sold but what they produced when cut. In my opinion the principle laid down in the case of *Marshall v. Green* (*supra*) applies to the instant case. In that case, at p. 39 Lord Coleridge, C.J. quoted from the notes in Williams' Saunders on an earlier case (*Duppa v. Mayo*) as follows:

"The principle of these decisions appears to be this, that wherever at the time of the contract it is contemplated that the purchaser should derive a benefit from the further growth of the thing sold from further vegetation and from the nutriment to be afforded by the land, the contract is to be considered as for an interest in land; but where the process is over, or the parties agree that the thing sold shall be immediately withdrawn from the land, the land is to be considered as a mere warehouse of the thing sold, and the contract is for goods. This doctrine has been materially qualified by later decisions, and it appears to be now settled that, with respect to emblements or fructus industriales, the corn and other growth of the earth which are produced not spontaneously, but by labour and industry, a contract for the sale of them while growing, whether they are in a state of maturity or whether they have still to derive nutriment from the land in order to bring them to that state, is not a contract for the sale of any interest in land, but merely for the sale of goods."

Applying the test laid down in that case, my opinion is that as the respondent purchased the goods with the intention of severing them ultimately (before 31 December 1963) under the agreement the effect of the definition of "goods" in s. 2 of the Sale of Goods Act makes a sale of fructus naturales a sale of goods. In my view therefore the agreement was a contract for the sale of goods and I agree with the judge that the Sale of Goods Act would apply to it. There is therefore no need to consider the effect, if any, of failure, to register it under the Registration of Titles Act.

The next question is whether by novation the appellants entered into a contract with the respondent whereby the former accepted responsibility for the delivery of the goods to the latter. In other words, whether the appellants stepped into the vendor's shoes and thereby agreed to discharge the vendor's obligation to the respondent. Novation is defined as "a transaction by which, with the consent of all the parties concerned, a new contract is substituted for one that has already been made" – see the Law of Contract by Cheshire and Fifoot (7th Edn.) p. 473, and Halsbury's Laws of England (3rd Edn.) Vol. 8, para. 298, at p. 175, which states as follows –

"One of the modes in which a contract may be discharged by a new agreement is called novation. This occurs where a third person undertakes the obligations of the contract and his liability is accepted by the promisee in place of that of the original promisor."

It is thus clear that for novation to exist the following requirements must be complied with: firstly, there must be consent of all the parties – See *Wilson v. Coupland* (1821), 106 E.R. at p. 1176 and secondly, there must be consideration for the extinguishment of the old obligation: see *Re Conner, ex p. Rivolta* (1882), W.N. 76. Can it, in the circumstances of the instant case, be said that these requirements have been complied with? In other words, did the appellants assume the vendor's obligation and did the respondent agree to accept the

appellants as his obligors and thereby discharge the vendor from her obligation? I do not think so. Consent cannot be implied from the acts of the parties here. The respondent through the advocates only sought confirmation from the appellants that the goods had been purchased by him and were not therefore being taken over by any other person. He obtained that confirmation. No consideration was given by the appellants. Strictly, there were no dealings or transactions between the parties from which an inference could be drawn that a new agreement between them had been substituted for the old one. Had there been evidence of any transaction between the parties showing that the appellants adopted the obligation of the vendor and that the respondent had agreed to accept the obligation of the appellants and to discharge the vendor therefrom, I would have had no doubt that novation would have been inferred – see *Rolfe v. Flower* (1865-7), 1 L.R.P.C. 27 and *Re Conner ex parte Rivolta*, (*supra*) and in *Re United Railways of Havana and Regla Warehouses Ltd.*, [1960] Ch. 52. With the greatest respect to Mr. Slade, I am unable to draw an inference from the circumstances of the instant case that a new agreement was made under which the respondent released the vendor from her obligation and the appellants agreed to assume that obligation. In my view nothing turns on the letter of 29 October 1963. It merely stated that the appellants had not purchased the said goods and the wattle trees, after being stripped of their bark, remained the property of the owner of the land who at that time was the vendee. Accordingly this ground of the cross-appeal must fail.

Turning now to the next question whether or not the appellants were constructive trustees of the goods for the respondent it cannot be doubted that the legal title to the land and the wattle trees on it was vested in the vendor as at 28 August 1963 (the date the offer was accepted and title deeds transferred to the appellants). A trust relation already existed between the vendor and the respondent who had already paid the full purchase price of the said goods and was entitled, as his remedy, to the right of specific performance under s. 52 of the Sale of Goods Act had there been a breach of the agreement by the vendor at anytime before 28 August 1963 – See *Oughtred v. Inland Revenue Commissioners*, [1959] 3 All E.R. 623 at p. 633.

The letters of 15 August and 29 October 1963 not only show that the appellants had full knowledge that the respondent had purchased the goods from the vendor but also amount to an acknowledgement that they took possession of the land subject to the respondent's right to cut and remove the goods. They had knowledge of the trust relation between the vendor and the respondent. I have no doubt that they became constructive trustees of the goods for the respondent, as the goods were clearly already affected by the trust – See *Pooley v. Budd* (1851), 51 E.R. at p. 200. I would go further on the basis of the principle stated in the latter case and say that the purchaser, who acquired the land and the goods from the appellants with full knowledge of the circumstances under which the latter obtained the same, would be compelled either to deliver the goods to the respondent or account for the proceeds of the sale thereof. The appellants had full notice and knowledge of the agreement between the vendor and the respondent that the goods had been sold to the latter. Notwithstanding this fact the appellants went ahead and sold the land and the goods to the purchaser without making any reference to the existence of the agreement. It was clearly their duty to protect the vested rights of the respondent under the agreement and as they failed so to do they cannot say that they had no notice of the vendor's trust. When they bought the land they assumed the same character as the vendor and they ought to have delivered or arranged with the purchaser to deliver the goods to the respondent. Their failure to do so was a breach of trust and they are liable in damages. For these reasons I would dismiss the appeal with costs and allow the second and third grounds of the

cross-appeal with costs to the respondent except for those costs which might have been occasioned by the adjournment by reason of the amendment of the cross-appeal, to which the appellants would be entitled.

Law JA: This is an appeal from the judgment and decree in a suit decided in the High Court of Kenya. The plaintiff, Mr. Nurdin Nurani, on 28 May 1962, entered into an agreement with a Mrs. Dickson, who, in consideration of the sum of Shs. 17,875 which was duly paid to her, sold to Mr. Nurani the right of cutting and taking bark from wattle plantations on land then in Mrs. Dickson's ownership, which land I shall refer to for the sake of convenience as "the farm". The agreement, which was in writing and had been drawn up by an advocate, and which referred to Mrs. Dickson as "the owner" and to Mr. Nurani as the "contractor", recited inter alia that –

"Whereas the said wattle plantations are ready for cutting and stripping before the end of December 1963, and the owner does not wish to carry out this cutting and stripping, the owner has agreed to sell to the contractor her cutting and stripping rights in the said wattle plantations"

and went on to state that the owner agreed to sell and the contractor to purchase the cutting rights of the said wattle plantations, which rights were defined as being limited to the bark only, the trees and brushwood remaining the property of the owner. To enable Mr. Nurani to exercise these rights he was given a right of entry on to the land, and a right to construct huts for his labour thereon, and to remove murram therefrom and dig latrines therein. This right of entry was to expire on 31 December, 1963, by which time the huts had to be removed, murram pits and latrines filled in, and the land generally returned to its natural condition. The effect of the agreement was that Mr. Nurdin bought and Mrs. Dickson sold the wattle bark on the farm; Mr. Nurdin was to do the felling of the trees and the stripping and removing of the bark, the trunks and brushwood being stacked and remaining behind as Mrs. Dickson's property. Mr. Nurdin was given some 18 months in which to fell the trees and strip and remove the bark and to enable him to do this he was given the right, strictly limited in time, to enter and remain on the land together with his servants and motor vehicles. It is common ground that the farm consisted of land registered under the Registration of Titles Act (Cap. 281) and that the agreement between Mr. Nurdin and Mrs. Dickson was not registered under s. 32 of that Act against the title to the land as being an instrument creating an interest in the land. I may say in passing that the parties to the agreement had no intention that it should create an interest in the land; indeed specific provision to this effect was made in clause 17 of the agreement which reads –

"The contractor acknowledges that he has no right or interest in the land of the owner."

This intention is however immaterial if the agreement in fact created a registrable interest. It is also common ground that by August 1963, Mr. Nurdin had paid the purchase price stipulated in the agreement, and had taken certain steps preliminary to extracting the bark, such as building huts for his labour, but had not yet begun to fell the trees and strip the bark. At about this time Mrs. Dickson was negotiating for the sale of the farm to the Central Land Board, an agency of the Settlement Fund Trustees, under what was then known as the Compassionate Farms Scheme. The Central Land Board was in possession of a report on the farm drawn up by one of its officers and dated 29 July 1963. The last paragraph of this report reads as follows –

"Note that the standing wattle has been sold privately and I understand arrangements will be made to have it cut in the near future. Sale is for bark only and the kuni will belong to the Board."

On 17 August 1963, the Central Land Board purchased the farm from Mrs. Dickson, and it is one of the agreed facts in this case that it did so with notice and knowledge of the agreement between Mr. Nurani and Mrs. Dickson. At some time during the month of October 1963, the Central Land Board sold the farm to a Mr. Arap Kemboi and let him into possession on 23 October. It is an agreed fact that this sale was in terms of an advertisement which made no reference to the fact that Mr. Nurani had bought all the wattle bark on the farm, and it is common ground that the Central Land Board, although it had notice of the agreement, put Mr. Arap Kemboi into possession without making any arrangement with him by way of covenant, agreement, indemnity or otherwise to protect Mr. Nurani's rights under the agreement. On 29 October 1963, the Central Land Board's secretary wrote to Mr. Nurani's advocates as follows –

"I herewith confirm that the wattle bark on (the farm) has been purchased by Mr. N. I. Nurani and forms no part of the assets which this Board includes in its purchase of this property, but the trees after having been stripped of their bark remain the property of the registered owner."

When at about this time and subsequently, Mr. Nurani attempted to strip and remove the wattle bark which he had bought, he was prevented from doing so by Mr. Arap Kemboi, who in the words of an officer of the Central Land Board "has been most aggressive towards him (Mr. Nurani) with the result that Nurani is terrified of going near the place." Mr. Nurani was thus unable, by the time his agreement expired on 31 December 1963, to enter on to the farm and remove the bark purchased by him, so that he has lost the money paid for the bark, and the profit he would have made on its resale, and his out-of-pocket expenses, in all Shs. 38,355/-. The question is whether, in these circumstances, Mr. Nurani is entitled to be compensated for his loss by the defendant, the Settlement Fund Trustees, whose agents the Central Land Board are.

By his plaint, Mr. Nurani claimed this sum of Shs. 38,355/- from the defendant, as damages either for breach of contract or for breach of trust. He pleaded firstly that there had been a novation of the agreement between Mr. Nurani and Mrs. Dickson in that the defendant had substituted itself for Mrs. Dickson in respect of all her obligations thereunder; and secondly that by reason of having been paid in full for the bark, Mrs. Dickson held the same in trust for Mr. Nurani, and that the defendant had assumed that trust in her place.

The defence consisted firstly of an assertion that the agreement was void for want of registration and not enforceable against the land, secondly of a denial that the defendant was liable under the agreement not being a party thereto or having become a party by novation, and thirdly that the defendant was under no duty towards Mr. Nurani so as to involve a breach of trust towards him on the defendant's part.

On the question of registration, the trial judge held that wattle bark constituted "goods" within the meaning of the Sale of Goods Act that the agreement for its sale constituted a contract for the sale of goods within the contemplation of that Act, and that the agreement did not create in favour of the plaintiff an estate or interest in land requiring compulsory registration under the Registration of Titles Act. Any rights to enter on the land were, in the judge's opinion, revocable licences in respect to which the power of revocation was suspended by agreement until 31 December 1963; such licences not being of such a nature as to constitute land or an interest in land within the meaning of s. 32 of the Registration of Titles Act, and therefore not requiring registration. The judge made no finding on the two pleaded causes of action that the defendant was liable for breach of a contract to which it had become a party by novation, or that the defendant had assumed the fiduciary burden as a trustee for the plaintiff in the place of Mrs. Dickson and was liable to the plaintiff for breach of trust. Instead

the judge found for the plaintiff on a ground which had not been pleaded or, so far as can be gleaned from the record, even argued. He did so by the purported application of the equitable doctrine enunciated in the case of *Tulk v. Moxhay*, [1843-1860] All E.R. Rep. 9 that if the owner of two pieces of land conveys one away, he can impose upon the part conveyed a restrictive covenant for the benefit of the land he retains, and the covenant will bind not only the immediate purchaser but all persons who thereafter take the land with notice, actual or constructive, of the covenant.

The defendant, the Settlement Fund Trustees, to whom I shall henceforth refer as the appellant, now appeals against this finding on two main grounds which have been most ably and persuasively argued on their behalf by Mr. Morrison. These grounds are firstly, that the doctrine in *Tulk v. Moxhay* (*supra*) had no application to the facts of the case now under consideration; and secondly that the judge erred in holding that the sale of wattle bark in the circumstances of this case constituted a sale of goods, but that he should have found that the agreement for such sale created an estate or interest in land requiring registration under the Registration of Titles Act, and that failure to register the agreement rendered it unenforceable against a purchaser of the land for value whether he had notice of the interest created by the agreement or not.

The plaintiff Mr. Nurani, to whom I shall refer henceforth as the respondent, has cross-appealed claiming that the decision of the judge should be supported on three other grounds, the first of which was added to the cross-appeal on an application made at the hearing, which was granted with the question of costs being reserved. The grounds are firstly, that the judge should have found there was a novation of the agreement with the result that the appellant took the place of Mrs. Dickson for all purposes in relation to the respondent; secondly that the appellant was a trustee for the respondent of the wattle bark the subject of the agreement; and thirdly that the appellant was estopped by reason of the acknowledgement made in its letter of 23 October 1963, to which reference has been made earlier in this judgment, from denying that it was bound by the contract. On these grounds of cross-appeal we have had the benefit of hearing Mr. Humphrey Slade who represented the respondent.

I will deal first with the appeal. Mr. Slade has not sought to support the decision in favour of the respondent on the ground relied on by the judge, that is to say by the application of the equitable doctrine in *Tulk v. Moxhay* (*supra*). I agree with Mr. Morrison and Mr. Slade that the judge was in error in applying that doctrine in this case, for the simple reason that the doctrine is dependent upon the retention by the covenantee of a dominant tenement, and at no time was the respondent the owner of such a tenement in relation to Mrs. Dickson's farm. The doctrine, in the words of Vaughan Williams, L.J. in *Formby v. Barker*, [1900-1903] All E.R. Rep. 445, is "something arising from the relation of two estates one to the other". Here we are only concerned with one estate, the farm. Clearly this ground of appeal must succeed.

The second ground of appeal, that the judge erred in holding that the agreement was for the sale of goods and did not create an interest in land requiring registration, raises questions of some difficulty. The definition of "goods" in the Sale of Goods Act includes –

"all emblements, industrial growing crops and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale".

The definition of "land" in the Registration of Titles Act includes –

"things embedded or rooted in the earth, or attached to what is so

Embedded . . . or permanently fastened to anything so embedded, rooted or attached, or any estate or interest therein . . .”.

Wattle bark, which is permanently attached to a tree rooted in the soil until the tree is felled and the bark stripped therefrom, could come under either definition. The question is, whether in the circumstances of this case, wattle bark is “an emblem or industrial growing crop” and therefore “goods” within the Sale of Goods Act, or whether a contract for its sale at a future date, together with a right of entry to the land on which it grows, constitutes a profit à prendre which is an interest in land requiring registration under the Registration of Titles Act if it is to be enforceable against a subsequent purchaser of that land. In coming to the decision that wattle bark was an emblem or industrial growing crop, the trial judge relied on *Marshall v. Green* (1875), 1 C.P.D. 35, in which it was held that a sale of growing timber to be taken away as soon as possible by the purchaser was not a contract for the sale of land, or of any interest therein, but a sale of goods. Mr. Morrison submitted that the judge misdirected himself in following *Marshall v. Green* (*supra*) because the contract in that case was for the immediate removal of the timber, whereas in the case now under consideration the parties contemplated that the bark should remain on the trees for a period which might extend to 18 months, during which time it would derive benefit from the land and become altered by virtue of what it draws from the soil (to use the words of Lord Coleridge, C.J. in *Marshall’s* case) so as to involve the acquisition of an interest in the land on which the trees were growing. This is an attractive argument, but after careful consideration I am of opinion that the judge’s finding that the sale of the bark was a sale of goods and not of an interest in land should not in the circumstances of this case be disturbed. The sale was of a single crop of wattle bark, stated in the agreement to be “ready for cutting and stripping before 31 December 1963”, which I take to mean ready for cutting and stripping at any time between the date of execution of the agreement and the end of 1963. The period of 18 months allowed for the taking of the bark was not primarily to allow it to derive benefit from the land and become altered, but to enable the purchaser to make the necessary arrangements for its exploitation by building labour lines, latrines etc. I agree with the judge that the right of entry on the land conferred by the agreement was no more than a temporary licence not amounting to a registrable interest in the land. I would therefore dismiss the ground of appeal directed against the judge’s finding that the agreement was for the sale of an industrial growing crop and therefore a sale of goods, in circumstances not creating an estate or interest in land such as to require registration under the Registration of Titles Act.

The basis of the judge’s award in favour of the respondent having gone, that is to say the purported application of the doctrine in *Tulk v. Moxhay* (*supra*) it remains for consideration whether that award should be upheld on one of the grounds put forward in the cross-appeal. These are, briefly expressed, that there was novation of the contract so as to make the appellant liable as a party, that the appellant assumed Mrs. Dickson’s obligations as a trustee for the bark, and estoppel arising out of the appellant’s letter of 29 October 1963. This last ground is purely incidental to the other two, as estoppel cannot found a cause of action. Mr. Slade relies on estoppel as precluding the appellant from denying that it stepped into Mrs. Dickson’s shoes both as a contracting party and as a trustee.

I think the ground of cross-appeal based on novation of the agreement can be shortly disposed of. To establish novation, it would be necessary for the respondent to establish clearly that the appellant had consented to assume Mrs. Dickson’s obligations under the agreement. To do this, Mr. Slade relies on the appellant’s letter of 29 October 1963, which is reproduced earlier in this judgment.

As I read that letter, it is no more than an acknowledgement by the appellant of the fact that under the agreement the wattle bark became Mr. Nurani's property, but that the timber remained the property of the registered owner of the farm. I do not think that more should be read into the letter than appears on the face of it. I certainly cannot infer from that letter any consent on the part of the appellant to assume the burden of Mrs. Dickson's liabilities under the agreement. The letter appears to me to be no more than a statement of the appellant's opinion as to the factual effect of the agreement.

There remains for consideration the ground of cross-appeal that the appellant is liable to the respondent as a trustee for breach of trust. For this Mr. Slade relies on the proposition expressed as follows in Lewin on Trusts (16th Edn.) at p. 153 –

“The moment you have a contract of sale of which specific performance could be obtained the vendor becomes in equity a trustee for the purchaser of the estate sold.”

The question arises whether a similar trust arises in the case of a contract for the sale of goods, when the goods have been paid for but not delivered. On this point, I refer to the following passage taken from Underhill's Law of Trusts and Trustees (11th Edn.) at p. 211 –

“For instance, if the seller has been paid every penny that he was entitled to and had no claim or interest in the chattels, and the contract only remains unperformed to the extent that the chattel has not been delivered to the purchaser, the seller would then be a mere trustee of the chattel for the purchaser or his assigns.”

If a trust be created, the circumstances that the subject matter of the contract is a chattel will not prevent a court of equity from enforcing the due execution of that trust, see *Pooley v. Budd* (1851), 51 E.R. 200. In that case it was held that a seller of goods, who retained possession of the goods after having been paid in full therefor, became a mere naked trustee of the goods, denuded of all interest therein other than in his capacity as trustee. By analogy, Mrs. Dickson having been paid in full for the bark on her wattle trees became a trustee in relation to Mr. Nurani for that bark. A contract for the sale of goods is one which, by statute, a court may in its discretion direct shall be performed specifically, see s. 52 of the Sale of Goods Act. In my view, a court would have ordered specific performance by Mrs. Dickson of her obligation to deliver the bark, had she refused delivery, and had Mr. Nurani sued her for specific performance rather than damages. Mr. Morrison however argues that even if Mrs. Dickson was in the position of a trustee, the burden of that trust did not transfer to the appellant automatically on its acquisition of the land, and he submits that, to be liable as a trustee, there must be something to show that the appellant adopted that character. As to this, Mr. Slade again relies on the appellant's letter of 29 October 1963, which Mr. Morrison says is no more than an admission that the appellant has no claim to the bark adverse to Mr. Nurani. Mr. Slade contends that the effect of this letter is a clear declaration of trust, that in it the appellant is saying “I own the trees, the bark is yours”, and that the appellant is estopped from contending otherwise. I have come to the same conclusion. When the appellant bought the farm, it did so with the knowledge that the wattle bark belonged to the respondent. It assumed, in relation to that bark, the same character as a trustee as had previously been held by Mrs. Dickson, and in particular assumed the obligation to deliver that bark to the respondent. It acknowledged that obligation in its letter of 29 October. In breach of that obligation, the appellant sold the farm to Mr. Arap Kemboi, together with the respondent's bark, without taking any steps to exclude the bark from that sale,

or otherwise to safeguard the respondent's rights in relation thereto. In so doing, the appellant was in my opinion guilty of a breach of trust towards the respondent, and is accountable to him for the loss he has thereby sustained. In my view, the cross-appeal succeeds on this ground. I would therefore dismiss the appeal and affirm the judgment in the court below, although on different grounds; and allow the cross-appeal. I agree with the order as to costs proposed by Lutta, J.A.

Spry VP: I agree, and there will be an order in the terms proposed by Lutta, J.A.

Appeal dismissed.

For the appellants:

A. F. Morrison (instructed by *Archer & Wilcock*, Nairobi)

For the respondent:

H. N. Slade and *S. K. Ahamed* (instructed by *Ahamed and Ahamed*, Nairobi)

Ojok v Uganda [1970] 1 EA 575 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	6 April 1970
Case Number:	592/1969 (111/70)
Before:	Dickson J
Sourced by:	LawAfrica

[1] *Criminal Practice and Procedure – Sentence – Preventive detention – When imposed.*

Editor's Summary

The appellant was convicted of the theft of Shs. 100/- from the complainant and was sentenced to two years' imprisonment. He was also sentenced to five years' preventive detention under s. 2 (1) of the Habitual Criminal (Preventive Detention) Act.

The accused was last convicted of an offence in October 1961 and served a sentence of seven years. He was released from prison in August 1967 and had committed no further offence from that date until the theft in June 1969.

On appeal the High Court upheld the conviction and confirmed the sentence of imprisonment but set aside the five year period of detention. In deciding whether to order detention the court must bear in mind how long the accused has been going straight and the nature of the offence of which he is convicted. In the circumstances of this case the prosecutor's application for detention was not justified. An order for detention was entirely a matter for the court to decide.

Cases referred to in judgment:

- (1) *Gentry* (1955), 39 Cr. App. R. 195.
- (2) *Walls* (1956), Crim. L.R. 209.
- (3) *Baylis* (1962), Cr. L.R. 57.
- (4) *Stefano Ochaya v. Uganda*, Cr. App. No. 398 of 1964 (unreported).
- (5) *Yokana Mato v. Uganda*, Cr. App. No. 310 of 1965 (unreported).
- (6) *Naughton* (1901), C.L.R. 187.

Judgment

Dickson J: The appellant was on 20 August 1969, convicted by a Magistrate Grade I sitting at Gulu, of theft. In 1 October, he was sentenced to two years' imprisonment and, he was also ordered to five years' preventive detention under s. 2 (1) of the Habitual Criminal (Preventive Detention) Act.

The case was submitted to a judge of this Court for confirmation of sentence. On 15 October, the judge addressed the following minute to the Registrar:

"I am not prepared to confirm the sentence without hearing the Director of Public Prosecutions for the following reasons:

1. The accused appears to have behaved himself since the last conviction on 31 October 1961. See Cr. App. 398/64 reported in the H.C. Monthly Digest as 115/64 and the case therein referred to of *Baylis* (1962), Cr. L.R. 57.
2. The offence was a foolish escapade. He was most unwisely given Shs. 100/- to go and get change but was overcome by the desire for drink and spent over Shs. 60/- of the change. There was no question of violence and he was bound to be caught.

Kindly refer the matter to the Director of Public Prosecutions for his views."

On 18 October, the Director of Public Prosecutions wrote as follows:

"If accused did not earn a remission his sentence of 7 years elapsed on 31 October 1968, and having committed another theft on 13 June 1969, that would leave him with only 8 1/2 months of good behaviour. In any event, this case appears to me to be a borderline case and if the learned Judge considers the sentence of Preventive Detention harsh, I will not oppose the order setting it aside."

In the meanwhile, the appellant lodged an appeal against both conviction and sentence and the same judge rightly ordered that as an appeal had been lodged the confirmation of his sentence could be dealt with at the same time. It is, therefore, in this manner that this case comes before me.

[After upholding the conviction the judge continued.]

I now turn to consider the sentence of five years' preventive detention. In this connection, I deem it necessary to refer very briefly to the facts. It appears that on 13 June, at about 1.00 p.m. the appellant was in a bar at Gulu, when the complainant entered and asked for two bottles of beer. He tendered a Shs. 100/- currency note to the barmaid. She had no change. The appellant said he had a bicycle, and that he would go and change the money quickly and return. The complainant waited for about one hour, but the appellant did not return. As the complainant had other business to attend to, he told the barmaid he would return at 5.00 p.m. for his change. When the complainant returned at 5.00 p.m. the appellant had not in the meanwhile come back to the bar.

The matter was reported to the police, and the appellant was found with only Shs. 53/10.

Over the years, this court, when dealing with the matter of preventive detention, has been guided by the principles laid down by the English Courts (since 1967, by the provisions of the Criminal Justice Act, 1967, preventive detention is abolished in England); bearing in mind, when considering the length of preventive detention, the English legislation did not (unlike Uganda), permit a sentence of preventive detention in addition to one of substantive imprisonment. See *Yokana Mato v. Uganda Criminal Appeal No. 310 of 1965* (item 66/65 Monthly Bulletin September 1965); *Stefano Ochaya v. Uganda Criminal Appeal No. 398 of 1964* (Monthly Bulletin October, 1964).

Among the principles to be considered when making an order of preventive detention are:

1. The accused must not have been for a long period without conviction, particularly immediately before his present conviction (*Baylis* above).

2. The accused must have been convicted of an offence which is neither trivial (*Naughton's* case, nor too serious (*Gentry* (1955), 39 Cr. App. R. 195; *Walls* (1956), Crim. R.R. 209).

Applying the above principles to the instant case, it has not been disputed that the appellant had been discharged from prison on 12 August 1967, and the offence of theft now under consideration was committed on 13 June 1969, some twenty-two months after his discharge. Coupled with that is, the circumstances of the theft (though reprehensible) do not possess any overtones of violence to person or property (for example robbery, theft from the person, burglary, housebreaking etc.).

In my view, the magistrate, in the circumstances ought to have refrained from passing a sentence of preventive detention. I agree, with respect, with the opinion expressed by the judge when the matter came before him for confirmation of sentence. And, as has been seen the Director of Public Prosecutions did not oppose an order setting aside the sentence of preventive detention. The opinions expressed in this judgment, must not be taken to mean that an accused could never be sentenced to preventive detention, because he had been going straight for more than twelve months since his release from prison; or that the offence is trivial. Each case must depend on its own circumstances. What is required is a balanced approach by magistrates, guided by certain principles.

It must be emphasised, that because the Director of Public Prosecutions applied for an order of preventive detention, it must not automatically follow. It remains the duty of the court to exercise its discretion, and this must be exercised judicially in accordance with principles. The decision is *solely* that of the court and of no other person.

In view of what I have stated above, the sentence of five years' preventive detention is set aside.

Order accordingly.

The appellant appeared in person.

For the respondent:

M. P. Radia (Senior State Attorney)

Wambwa v Okumu
[1970] 1 EA 578 (HCK)

Division:	High Court of Kenya at Eldoret
Date of judgment:	18 May 1970
Case Number:	3/1968 (117/70)
Before:	Mosdell J
Sourced by:	LawAfrica

[1] *Customary Law – Custody of children – Child – Order to father without consideration of child's welfare – Custom inconsistent with written law – Judicature Act, s. 3 (2), Guardianship of Infants Act*

(Cap. 144), s. 17 (K.).

[2] *Infant – Custody – Young daughter – Normally in child's interest to be with mother.*

Editor's Summary

Custody of an illegitimate four year old female child was granted to its putative father under the principles of the relevant customary law. On second appeal.

Held –

- (i) the customary law did not take into account the welfare of the infant;
- (ii) in the absence of exceptional circumstances a four year old girl should be looked after by its mother;
- (iii) the customary law is inconsistent with the Guardianship of Infants Act, s. 17 (*Karuru v. Njeri* (2) not followed).

Appeal allowed.

Cases referred to in judgment:

- (1) *Timina Olenja v. Elam Keya*, Court of Review L.R., Vol. X, p. 8.
- (2) *Karuru v. Njeri*, [1968] E.A. 361.

Judgment

Mosdell J: This is a second appeal, from a decision of the Resident Magistrate Kitale who, dismissed an appeal by the appellant from a decision of the African Court, Kitale whereby the custody of a female child Rosa Okumu born out of wedlock to Florence the appellant's daughter was granted to the respondent who is the putative father.

The appellant is a Bagishu by tribe and subject to Bagishu customary law and the respondent is a Muluhia, subject to Marach customary law. At the trial at first instance the African Court, in accordance with the relevant Bagishu law on the point, as given to it by two Bagishu assessors, awarded the respondent the custody of the child on condition that the respondent paid the appellant one head of cattle valued at Shs. 200. One might ask why Bagishu customary law should be applicable in this case and not Marach customary law. However, all concerned seem to have assumed that Bagishu customary law was the relevant customary law and the matter has not been raised in either appeal, though before the Resident Magistrate the appellant did aver that the assessors in the African court "did not state the customary law properly". He was, however, referring to the Bagishu customary law. It is, therefore, not necessary to consider this aspect of the matter any further.

The ground of appeal to this court was that the magistrate erred in his judgment in not directing himself to take into account the interests of the child as the over-riding consideration and in not holding that these interests require that the child should not be separated from her mother. He further erred in not considering adequately the grounds of appeal brought forward by the appellant

that the judgment of the lower court was contrary to true native custom and that the assessors who were called by the lower court were not properly qualified to state the true native custom. Mr. Lindsell, who appeared for the appellant at the hearing of his appeal, abandoned the second limb of the ground, however, and the sole remaining ground is the first limb as above mentioned.

Mr. Lindsell submitted that, although Bagishu customary law may have been correctly applied to the facts of this case, it appears to conflict with the provisions of s. 17 of the Guardianship of Infants Act (Cap. 144) which reads as follows:

- “17. Where in any proceeding before any court the custody or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, up-bringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father.”

Mr. Lindsell submitted further that under s. 17 the first and paramount consideration is the welfare of the infant and the granting of custody of an infant of four years of age to the putative father rather than the infant's mother was not conducive to the infant's welfare. I do not think it can be controverted that in the absence of exceptional circumstances, the welfare of a female infant aged four years (which is the age of the infant in this case) demands that the infant be looked after by its mother rather than its putative father. There appear to be no exceptional circumstances in this case. There is here, therefore, as it seems to me, a direct conflict between what has been regarded as the proper Bagishu law on the point and the provisions of s. 17 of the Guardianship of Infants Act.

Section 3 (2) of the Judicature Act states:

- “3(2) The High Court and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.”

In the circumstances, therefore, I have no option but to hold that the relevant Bagishu customary law is inconsistent with a written law viz: s. 17 of the Guardianship of Infants Act.

Mr. Lindsell referred me to an article in the “East African Law Journal”, Vol. IV, No. 3 of September 1968 at pp. 153-154 entitled “Custody of Children Under Customary Law” by Mr. Eugene Cotran. This article is not, of course, authoritative so far as the Courts of Kenya are concerned, but I am indebted to the learned writer of this article and to Mr. Lindsell for drawing my attention to it. This article refers to two cases which have relevance here viz: *Karuru v. Njeri* [1968] E.A. 361 and *Timina Olenja v. Elam Keya*, Court of Review Law Reports, Vol. X, p. 8.

In *Karuru's* case Simpson, J., found that the Kikuyu custom, that on the divorce of their parents, children go to the father unless the father demands the return of the bride price in which case they go to the mother provided the bride price is returned in full, was not inconsistent with any written law. With respect, I disagree with my brother (whose decision I suspect was reached per incuriam as the case was not argued by counsel) for as stated by my brother in his judgment “an inflexible custom such as this one gives no consideration to

the welfare of the children of the marriage” whereas s. 17 of the Guardianship of Infants Act, specifically states that in proceedings relating to custody of infants the welfare of the infant is the first and paramount consideration.

It may appear odd that, to the proceedings had to date in this case, the mother of the infant has not been a party. This happens, of course, because in affiliation cases under customary law it is the practice for the father of the girl concerned to bring proceedings. It is the girl’s father, here, who seeks to be granted custody of the infant, not the girl herself. I have no doubt that were the father of the girl (the appellant) to be granted custody of the infant he would allow his daughter (the mother of the infant) to look after it. However, in order to legalise such an eventuality it seems to me that I should have to take a leaf from the book of the Court of Review, which in Timina’s case, gave legal custody of a child to one party and physical custody of the same child to another party. I equate physical custody in this context with care and control.

The appellant in this case seeks custody of Rosa for himself or his daughter Florence. But Florence is not, nor has she been, a party to the proceedings at any stage. I think, therefore, that I would be exceeding the bounds of what is permissible if I were to grant custody of the infant to Florence, or it’s custody to the appellant but its care and control to Florence, however neat the latter solution may appear to be.

I order that custody of the infant Rosa be and is hereby granted to the appellant. In sum, the appeal is allowed, with costs both here and in the two lower Courts.

Appeal allowed.

For the appellant:

R. F. J. Lindsell

The respondent appeared in person.

Somani’s v Shirinkhanu
[1970] 1 EA 580 (CAM)

Division:	Court of Appeal at Mombasa
Date of judgment:	16 July 1970
Case Number:	10/1970 (119/70)
Before:	Duffus P, Spry VP and Lutta JA
Sourced by:	LawAfrica
Appeal from:	The High Court of Kenya – Harris, J.

[1] Statute – Retrospective effect – Express words required – Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap. 301), s. 1 (K.).

[2] Statute – Retrospective effect – No power to Minister to bring Act into force retrospectively.

[3] Statute – Rules – Retrospective operation – Notice bringing statute into operation not within Interpretation and General Provisions Act (Cap. 2), s. 28.

[4] Rent Restriction – Business premises – No power to bring Act into force retrospectively – Landlord and Tenant (Shops Hotels and Catering Establishments) Act (Cap. 301).

Editor's Summary

The Landlord and Tenant (Shops Hotels and Catering Establishments) Act (Cap. 301), s. 1 (1) gave the Minister power to bring into it effect on different dates for different parts of the country. The Minister by notice purported to bring the Act into force retrospectively in respect of Mombasa.

Held –

- (i) there is no intention expressed in the Act that it should operate retrospectively;
- (ii) the Minister had no power to make an order bringing the Act into operation retrospectively;

- (iii) (by Spry, V.-P.) a notice bringing an Act into operation is not subsidiary legislation which may be made to operate retrospectively under the Interpretation and General Provisions Act, s. 28.

Appeal dismissed.

Cases referred to in judgment:

- (1) *Lauri v. Renad*, [1892] 3 Ch. 402.
- (2) *West v. Gwynne*, [1911] 2 Ch. 1.
- (3) *Remon v. City of London Real Property Co. Ltd.*, [1921] 1 K.B. 49.
- (4) *T. K. Musaliar v. Venkatachalam Potti*, 1 A.I.R. 1956 S.C. 246.
- (5) *Govindji Papatlal v. Premchand Raichand*, [1963] E.A. 69.
- (6) *Municipality of Mombasa v. Nyali Ltd.*, [1963] E.A. 371.
- (7) *Karmali v. Mulle and Others*, [1967] E.A. 179.

[**Editorial note:** The attention of the court was not drawn to the Statute Law (Miscellaneous Amendments) Act 1967, s.3, which validates the Minister's notice and provides a retrospective operation for the Act]

The following considered judgments were read.

Judgment

Lutta JA: The appellant was in occupation of a shop as a monthly tenant prior to 1966 and was served by the respondent with a notice to quit effective on 30 April 1966. The appellant did not quit and consequently the respondent filed suit on 10 June 1966, claiming vacant possession of the suit premises, arrears of rent in the sum of Shs. 1,150/- for the month of April 1966 and mesne profits from 1 May 1966, until actual possession at the rate of Shs. 1,600/- per month. On 10 May 1966, the Landlord and Tenant (Shops, Hotels and Catering Establishments) (Commencement) Order 1966 (hereinafter referred to as the "Order") made on 6 May 1966 under s. 1 (1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap. 301) (to which I shall, hereinafter refer as "the Act") was published declaring that the Act "shall be deemed to have come into operation on 3 May 1966" in respect of Mombasa area. The written Statement of Defence was not filed until 6 September 1966 and on 27 September 1966, there was published, Legal Notice No. 283 of 19 September 1966 (hereinafter referred to as the "the legal notice") in which, by exercising powers conferred on him by s. 1 of the Act, the Minister appointed inter alia, the following dates,

- "(a) 3 May 1966 as the date on which the Act shall come or be deemed to have come into operation in the Mombasa Municipality; and
- (b) 1 January 1966 as the date on which tenancies are required to have been subsisting for the purposes of sub-s. (2) of s. 1 of the Act in the Mombasa Municipality."

In the Legal Notice the Order was revoked. At the hearing of the suit the only issue argued was whether the appellant was entitled to the protection of the Act and whether the court had jurisdiction to hear the suit. However, in his judgment, the judge considered also the question as to whether the Act should be

accorded retrospective effect. He decided that the appellant was not entitled to the protection of the Act and thus the court had jurisdiction to hear the suit and also that the Act operated retrospectively as the date on which the tenancy was required to have been subsisting in order to enjoy the protection of the Act preceded the date of the coming into operation of the Act. Against that decision the appellant lodged the appeal. Mr. Talati for the appellant submitted that the

judge erred when he held that the Act did not apply to the pending litigation. Reduced to its simple terms Mr. Talati's argument was that the suit was not pending on 3 May 1966 when the Act was deemed to have become operative to Mombasa and therefore the Act should have applied to the suit which was filed on 10 June 1966. For this proposition he relied on the case of *Govindji Popatlal v. Premchand Raichand*, [1963] E.A. 69. He also argued that as the Act was intended to give protection to the tenants the provisions of s. 1 (2) thereof must be construed to have a retrospective effect. He relied on the case of *Karmali v. Mulle and Others*, [1967] E.A. 179. He submitted that the term "tenant" as defined in the case of *Remon v. City of London Real Property Co. Ltd.*, [1921] 1 K.B. 49 should be applied in the instant case.

Mr. Wilkinson for the respondent applied for leave to file and argue a cross-appeal that the Minister's order (The Legal Notice) is ultra vires and thus a nullity in so far as it purports to apply the Act to Mombasa as from 3 May 1966. We granted leave for Mr. Wilkinson to argue that point. He contended that the Act did not affect the right of action by the landlord against a person in occupation although it was intended to protect tenants and that as the appellant's tenancy came to an end before the Act was brought into force, that is, on 3 May 1966, there was no protection for the appellant in the Act. Mr. Wilkinson, referring to the case of *Govindji Popatlal v. Premchand Raichand* (*supra*) pointed out that that case was distinguishable from the instant case in that the Act does not have similar provisions to those contained in the Land Titles (Amendment) Ordinance 1959, which was the subject of consideration in that case, and therefore the Act cannot be given a retrospective effect. He submitted that a statute is not given retrospective effect unless it is expressly provided therein or unless it follows by necessary implication; further that there is nothing in the Act to make it retrospective and therefore the Minister should not have made the Act retrospective. He argued that the Legal Notice was wrong as it purports to make retrospective appointments as to dates. He also referred us to the case of *T. K. Musaliar v. Venkatachalam Potti* 1 A.I.R. 1956 S.C. 246 art. 38 at p. 258. With respect I am not at all inclined to follow that case.

I think it is necessary to deal with Mr. Wilkinson's submissions on the question of the Legal Notice being ultra vires s. 1 (1) of the Act first because if they are upheld, there would be no need to consider the grounds of appeal. The validity of the Act itself is not here being canvassed nor is the Minister's statutory authority to make appointments as to dates in doubt. The question here is whether the Minister has power to make retrospective appointments as to dates under s. (1) 1 of the Act, which is the commencement section, and reads as follows –

"This Act may be cited as the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act 1965, and shall come into operation on such date as the Minister may by notice in the Gazette appoint:

Provided that the Minister may appoint different dates for different areas of Kenya, and may by notice in the Gazette exempt any area of Kenya from the operation of this Act."

Looking at the general scope and purview of the Act, it is clear that it is intended to protect persons who are tenants or in occupation of shops, hotels and catering establishments as defined in the Act, by reason of a lease or underlease, agreement or by operation of law. The words "shall come into operation" which appear in s. 1 (1) of the Act indicate the prospective nature of the Act. That is, those words show that the Act was intended to operate prospectively and thus are appropriate to that object. However, the words "shall be deemed to have come into operation" which appear in the legal notice but which are not in s. 1 (1) of the Act do suggest that the Act was intended to operate retrospectively.

The question then arises as to whether Parliament, in s. 1 (1) of the Act, has sufficiently expressed that intention. If Parliament intended the Act to apply retrospectively, it would have expressly said so in that section or in any part of the Act, or the words “shall be deemed to have come into operation” or words to that effect would have been used therein. The absence of such words in s. 1 (1) or in any part of the Act seems to me to militate against a retrospective operation of the Act and against the general principle that a statute is not to be construed so as to have a retrospective operation unless its language is such as plainly to require that construction – see *Lauri v. Renad*, [1892] 3 Ch. 402 at p. 421 and *West v. Gwynne*, [1911] 2 Ch. 1. I think the words “shall come into operation on such date as the Minister may, by notice in the Gazette, appoint” ought to be construed as being applicable to future dates only if the rule that an Act of Parliament is generally to be construed as being prospective and intended to regulate the future conduct of persons is still a sound guide for purposes of construing an Act of Parliament. The only exception is, of course, where Parliament intends to affect past conduct or a past state of circumstances, in which case it expressly so provides in an Act. In my view these considerations provide sufficient reason for limiting the operation of, and holding that, the words “shall come into operation . . .” in s. 1 (1) of the Act are intended to apply, to future dates as opposed to past dates. The words “shall be deemed to have come into operation” would not only be appropriate but necessary in s. 1 (1) of the Act if Parliament intended the Act to operate retrospectively. It seems to me that the Minister under s. 1 (1) of the Act can only make appointments as to a future date and not a past date.

Since s. 1 (1) of the Act does not confer on the Minister power to apply the Act retrospectively, can it be said on general principles that from the subject-matter or from the wording of the Act, it ought to be held to operate retrospectively? The intention to this effect can only be gathered from the Act as a whole. The Act is intended primarily to protect tenants. It lays down tenants’ rights vis-à-vis those of their landlords. The general rule of law is that unless there is a clear indication either from the subject matter or from the wording of an Act of Parliament, that Act should not be given a retrospective construction – see *Municipality of Mombasa v. Nyali Ltd.*, [1963] E.A. 371 at pp. 374 and 375. I cannot find anything or a provision in the Act which indicates that it should be given retrospective operation. The appellant was served with a notice to quit effective on 30 April 1966 and when he failed or refused to quit the respondent filed the suit on 10 June 1966, claiming vacant possession from 1 May 1966. What was the effect of the Legal Notice on the respondent’s rights? The respondent had, for example, already accrued to her the right of action against the appellant. By virtue of the legal notice she was required to comply with the provisions of ss. 4 and 7 of the Act (dealing with the “Notice of termination or alteration of terms of tenancy” and “Grounds on which landlord may seek to terminate tenancy” respectively). By reason of the legal notice the respondent was clearly prejudiced – her rights were affected adversely. In my view to hold the Act retrospective would be to deprive her of a right which she had actually acquired, and on the authority of the *Municipality of Mombasa v. Nyali Ltd.* (*supra*) Parliament’s intention to apply the Act retrospectively and thus affect the respondent’s substantive rights has not been manifested in the Act. In my view the Legal Notice is *ultra vires* s. 1 (1) of the Act and is therefore null and void to the extent that it purports to apply the Act to Mombasa Municipality with effect from 3 May 1966. For these reasons I would dismiss this appeal in respect of vacant possession and the award of costs and interest on the decretal amount but allow it in respect of mesne profits, which will be referred back to the High Court for further investigation and for an award for such a sum as the respondent may be entitled to with power for the High Court to make any further order for costs in respect thereof. Costs of the appeal and of the cross-appeal

except those relating to the question of mesne profits to be the respondent's. I would grant a certificate for two counsel.

Duffus P: I have had the advantage of reading the judgment of Lutta, J.A.

I agree that s. 1, of The Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap. 301) does not confer any power on the Minister to bring the Act into operation retrospectively and accordingly that Legal Notice No. 283 dated 19 September 1966 is ultra vires s. 1 of the Act in so far as it purports to apply the Act to Mombasa with effect from 3 May 1966. This would also apply to Legal Notice No. 126 of 1966, dated 6 May 1966 in so far as it also purported to apply the Act to Mombasa as from the 3 May 1966.

The result is that the appellant's tenancy was terminated by the notice to quit, expiring on 30 April 1966 and that the tenancy had ceased to exist on 1 May 1966. The appellant then became a trespasser and the respondent acquired the right to immediate possession of his premises.

I agree therefore both for the reasons stated by the trial judge and those set out by Lutta, J.A. that the provisions of The Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, do not apply to this case and I agree that the appeal be dismissed in so far as the order for possession is concerned. The advocates for both parties, however, agree that the trial judge erred in ordering the payment of mesne profits at the rate of Shs. 1,600/- per month and they agree that the matter must be referred back to the High Court for further investigation and to award such sum as the respondent may be entitled to but that this order would not affect the costs of this appeal.

I agree with the order proposed by Lutta, J.A. and as the Vice-President also agrees, it is ordered that the appeal be dismissed in so far as the order for vacant possession and the award of costs and interest are concerned but allowed in respect of the order for mesne profits. The order for mesne profits is set aside and the matter is referred back to the High Court for further investigation and for the award for such a sum as the plaintiff may be entitled to with power for the High Court to make any further order for costs on this question. Costs of the appeal and of the cross-appeal except for costs on the question of mesne profits will be the respondent's. We grant a certificate for two counsel.

Spry VP: I am in complete agreement and there are only two points on which I would briefly comment.

First, s. 28 of the Interpretation and General Provisions Act (Cap. 2) provides, subject to certain qualifications, that –

“Any subsidiary legislation may be made to operate retrospectively to any date, not being a date earlier than the commencement of the written law under which such subsidiary legislation is made,”

and under s. 2 –

“ ‘subsidiary legislation’ means any legislative provision . . . made in exercise of any power in that behalf conferred by any written law, by way of . . . notice . . . or other instrument.”

A definition in s. 2 only applies, of course, “except when there is something in the subject or context inconsistent with such construction or interpretation.” In my view, the wording of s. 28 is clearly inappropriate to a notice bringing an Act into operation. Moreover, I cannot think that it was the intention of the legislature that statutes should be brought into operation with retrospective

effect, except where it expressly so provides, since this might have incalculable effects on vested rights. I would hold therefore that s. 28 has no application.

Secondly, we were referred to the Indian case of *T. K. Musaliar v. Venkatachalam* A.I.R. 1956 S.C. 246. We are not, of course, bound by that decision and I would only say, with respect, that I would not be prepared to follow it.

*Appeal against order for possession dismissed. Assessment of mesne profits
remitted for assessment.*

For the appellants:

P. S. Talati and K. M. Pandya (instructed by *Pandya & Talati*, Mombasa)

For the respondent:

P. J. Wilkinson Q.C. and M. Satchu (instructed by *Atkinson Cleasby & Satchu*, Mombasa)

Mudavadi v Kibisu and another [1970] 1 EA 585 (CAN)

Division: Court of Appeal at Nairobi
Date of judgment: 20 July 1970
Case Number: 25/1970 (120/70)
Before: Duffus P, Law and Mustafa JJA
Sourced by: LawAfrica

[1] *Appeal – Jurisdiction – Election petition – Order not determining validity of election – Jurisdiction to hear appeal – Constitution, s. 44 (K.), Civil Procedure Act (Cap. 5), s. 75 (K.).*

[2] *Constitutional Law – Elections – Returning officer – where complaints made returning officer is respondent to petition – Election Petition Rules, 1961, r. 2, (K.).*

[3] *Constitutional Law – Elections – Returning officer – Includes presiding and deputy presiding officers appointed by him – Election Petition Rules, 1961, rr. 2, 10 (K.).*

[4] *Constitutional Law – Elections – Returning officer – Must be served with petition – Election Petition Rules, 1961, r. 15 (K.).*

Editor's Summary

An election petition filed by the appellant challenged the conduct of the returning officer and also the conduct of presiding officers at polling stations. The returning officer's name was not included in the heading of the petition nor was he served with the petition within the time allowed by the Election

Petition Rules, 1961, r. 15. The High Court ruled that the returning officer had not been made a respondent, and had not been served in time, and that complaints against presiding officers or deputy presiding officers are complaints against the returning officer.

The appellant appealed:

Held –

- (i) the court has jurisdiction to hear an appeal from an order of the High Court which did not determine the validity of the election;
- (ii) a returning officer against whom complaints are made automatically becomes a respondent;
- (iii) a returning officer respondent must be served within the time allowed by the Election Petition Rules, 1961, r. 15;
- (iv) complaints against presiding officers or deputy presiding officers appointed by the returning officer are complaints against the returning officer.

Appeal dismissed.

Cases referred to in judgment:

- (1) *Harmon v. Park and Another* (1880), 6 Q.B.D. 323.
- (2) *Devan Nair v. Yong Kuan Teik*, [1967] 2 A.C. 31.

Judgment

The considered judgment of the court was read by **Duffus P:** This is an appeal from an interlocutory ruling of the Election Court sitting as a division of the High Court of Kenya. No point was taken by the parties as to the jurisdiction of this court to hear the appeal. We, however, asked the advocates to address us on this matter. Mr. Slade appearing for the appellant addressed us at some length and so did Mr. Potter, Q.C. of the Attorney-General's Chambers who appeared for the second respondent, the returning officer. Both advocates agreed that this court did have jurisdiction.

The election petition is to determine whether Peter Frederick Kibisu has been validly elected as a member of the National Assembly. Section 44 of the Constitution states that the High Court shall have jurisdiction to hear and determine any question relating to membership of the National Assembly and declares that such determination shall not be subject to appeal. The relevant part of s. 44 states:

“44(1) The High Court shall have jurisdiction to hear and determine any question whether –

- (a) any person has been validly elected as a member of the National Assembly; or
 - (b) the seat in the National Assembly of a member thereof has become vacant.
- (2) An application to the High Court for the determination of a question under subsection (1) (a) of this section may be made by any person who was entitled to vote in the election to which the application relates, or by the Attorney-General.

.....(3)

- (4) Parliament may make provision with respect to –
 - (a) the circumstances and manner in which, the time within which and the conditions upon which an application may be made to the High Court for the determination of a question under this section; and
 - (b) the powers, practice and procedure of the High Court in relation to any such application.
- (5) The determination by the High Court of any question under this section shall not be subject to appeal.”

Mr. Slade stressed that under sub-s. (5) that it was only the determination of any question under this section that should not be subject to appeal and that there are only two questions dealt with in this section and that is whether under sub-s. (1) (a) any person has been validly elected as a member of the National Assembly or whether under sub-s. (1) (b) the seat of any member in the Assembly has become vacant.

He submitted that the appeal in this case was only on an interlocutory ruling on a matter of procedure and that the jurisdiction of this court to hear this appeal is that given by the Civil Procedure Act (Cap. 5). Section 66 of this Code provides:

“66. Unless otherwise expressly provided in this Ordinance, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie from the decrees or any part of decrees and from the orders of the Supreme Court to the Court of Appeal for Eastern Africa.”

Then s. 75 specifically provides for appeals from orders and states inter alia:

“75(1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted:”

The order in this case does not fall within any of those orders specifically set out in s. 75, but the election court which made the order the subject of this appeal granted the appellant leave to appeal to this court. We would also refer to the provisions of the National Assembly and Presidential Elections Act, 1909. Section 19 of that Act provides for the Constitution of an election court as follows:

“19. Every application to the High Court under the Constitution to hear and determine a question whether –

- (a) any person has been validly elected as President; or
- (b) any person has been validly elected as a member of the National Assembly or
- (c) the seat in the National Assembly of a member thereof has become vacant,

shall be made by way of petition, and shall be tried by an election court consisting of three judges.”

Election court is also defined by s. 2 as:

“ ‘election court’ means the High Court in the exercise of the jurisdiction conferred upon it by sub-s. (1) of s. 44 of the Constitution;”

It is clear therefore that the election court is a division of the High Court consisting of three judges of the High Court and that this petition to the election court is in fact a petition to the High Court.

We are therefore of the view that this court has jurisdiction to hear this appeal by virtue of ss. 66 and 75 of the Civil Procedure Act and that this appeal is not on a question which amounts to a determination of any question under s. 44 of the Constitution of Kenya.

We were referred to various English authorities but with respect those authorities are not of much assistance as the question of our jurisdiction depends solely on the interpretation of the relevant section of the Constitution and of the laws of Kenya and these in our view clearly define our jurisdiction to hear this appeal.

This appeal may be considered under two heads –

- (i) The ruling that the Returning Officer was not a party to the petition and further that he had not been served.
- (ii) Whether the Election Court correctly held that the petitioner could not adduce evidence that would amount to a complaint against the conduct of a presiding officer or deputy presiding officer.

Part VI of the National Assembly and Presidential Elections Act provides for the due presentation and hearing of election petitions. Section 20 deals

specifically with the presentation and amendment of the petition. The Election Petition Rules 1961 still apply to National Assembly and Presidential Election Act. We would first refer to the definition of “respondent” in r. 2 of the Rules, this states:

- “2. In these Rules, unless the context otherwise requires ‘respondent’, in relation to an election petition, means the person whose election or nomination is complained of, and, if the petition complains of the conduct of a returning officer, includes that officer.”

Mr. Slade first submitted that once the conduct of the returning officer was complained of he automatically became a respondent and that as his conduct had been complained of in this petition that he was a respondent and there is no need for this to have been formally stated in the petition. Mr. Potter agrees that the returning officer automatically became a respondent in these circumstances and that there is no provision for him to be named in the form of the petition set out in these Rules but he submitted that if the petitioner desired to proceed against the returning officer as the respondent then he must be served in accordance with the provisions of r. 15. Rule 15 provides:

- “15. Notice of the presentation of a petition, accompanied by a copy thereof, shall, within ten days of the presentation of the petition, be served by the petitioner on the respondent. Such service may be effected either by delivering the notice and copy aforesaid to the advocate appointed by the respondent under rule 10 of these Rules or by posting the same in a registered letter to the address given under rule 10 of these Rules of such time that, in the ordinary course of post, the letter would be delivered within the time above mentioned, or if no advocate has been appointed, or no such address given, by a notice published in the Gazette stating that such petition has been presented, and that a copy of the same may be obtained by the respondent on application at the office of the Registrar.”

In his submission Mr. Slade submitted that r. 10 and r. 15 are so closely bound together that they must be read as one. With respect though, r. 10 only applies to persons elected or nominated for election and does not apply to the returning officer, while r. 15 specifically deals with service of the petition on a respondent which must in our view, in the circumstances of this case, include the returning officer. The returning officer has in this petition had various complaints made against his conduct both in his own capacity and as being the person responsible for the conduct of the election. We are of the view therefore that the returning officer should have been served in accordance with r. 15 and this means by a notice published in the Gazette. It is agreed that no notice to this effect was published within the specified time. We are told that such a notice was published on 27 February 1970 which would be completely out of time.

Mr. Slade also suggested that the returning officer would be automatically represented by the Attorney-General but with respect we cannot agree. The Attorney-General is required by s. 24 of the National Assembly and Presidential Elections Act, 1969 and also by r. 34 of the Election Petition Rules, 1961 to attend the trial but this is not for the purpose of representing the returning officer although he can of course do so as he has in this case.

We are therefore of the view that the judges of the election court were correct in finding that the returning officer had not been served as he should have been in accordance with r. 15. The effect of this is that the returning officer was not properly brought before the election court as a party to these proceedings and we are of the view that the election court were correct in holding that while the petition may proceed, the parties would not be permitted to raise or pursue any matter that could be construed as a complaint against the conduct of the returning officer. In its judgment the election court said:

“In the result we find that a returning officer, as a party to a petition must necessarily be made a respondent and service on him must be effected in accordance with rules 10 and 15 of the rules. The returning officer in this case was not made a respondent to the petition and service on the named respondent was not service on the returning officer. That making the returning officer a respondent being an amendment to the petition, and the time for amending the petition having expired before the named respondent was served the returning officer can neither be said to be a party to the petition, nor can he now be made a respondent to the petition.”

We agree as we have stated that the returning officer was not served but it is our view that he was automatically a respondent to this petition having regard to the complaint made against his conduct as returning officer and in this respect he need not have been specifically named in the petition so to this extent we agree that the petition need not have been amended but on the other hand, as we have stated, he must be served as a respondent and be brought before the court in accordance with r. 15 and this was not done. Mr. Potter has pointed out that no application was made to the election court for leave to serve the returning officer out of time. Mr. Slade agrees that no such application was made but states that he might still ask the election court for leave in the event of this court upholding the ruling of the election court as to the effect of r. 15. This question does not now therefore really arise on this appeal but it would appear unlikely that the election court would now grant an extension of time especially having regard to its decision in the Okova Election Petition 3 of 1970, which followed the decision of the Privy Council in similar circumstances in a case from Malaysia (see *Devan Nair v. Yong Kuan Teik*, [1967] 2 A.C. 31).

There is then the question as to whether the election court were correct in ruling that it would not permit the parties to raise any matter that could be construed as a complaint in the conduct of the returning officer including here the conduct of a presiding officer or deputy presiding officer.

The answer to this question must depend on the interpretation of our law and rules. Both parties however relied on English authorities as having some persuasive value. Mr. Slade referred especially to the case of *Harmon v. Park and Another* (1880), 6 Q.B.D. 323 and especially Lord Selborne, L.C.’s judgment to the effect that the words “complaints of the conduct” must mean an imputation of misconduct of the returning officer himself. On the other hand, Mr. Potter referred us to the general statement of the law in Halsbury’s Laws of England (3rd Edn.) Vol. 14, p. 255 where the author said:

“Where, however, a parliamentary election petition complains of the conduct of a returning officer, he will, for all the purposes of the Act, except as regards the admission of respondents in his place, be deemed to be a respondent. The allegation against the returning officer need not necessarily be one of wilful misconduct, and he may be joined as a respondent where the acts or omissions or negligences complained of are not personal but are those of his subordinates.”

The author refers to a number of cases in support of his statement and refers to the *Harmon v. Park* case as being against the statement.

Here again the question depends solely on the interpretation of our own law. We would first refer to the National Assembly and Presidential Elections Act. Section 13 provides for the issue of a writ under the hand of the Speaker of the National Assembly addressed to the returning officer of each constituency. Then s. 14 enacts that the returning officer shall proceed to hold the election. Section 14 states:

“14(1) After a notice has been published in the Gazette under section

12 of this Act, every returning officer shall proceed to hold a Presidential election according to the terms of such notice and in accordance with the Regulations.

- (2) After receiving a writ under section 13 of this Act, the returning officer to whom it is addressed shall proceed to hold the Parliamentary election according to the terms of the relevant notice published under subsection (3) of the said section and in accordance with the Regulations.”

Then s. 2 of the Act defines returning officer as –

“ ‘returning officer’ means a person appointed under the Regulations for the purpose of conducting any election under this Act;”

The National Assembly and Presidential Elections Act is the Act under which Parliamentary elections are held and this Act specifically appoints and charges the returning officer with the conduct of the election. It is true that returning officers must have assistance to conduct the elections and the Parliamentary and Presidential Elections Regulations, 1969 does provide for such assistance but it is the returning officer whom the law recognizes and gives the responsibility of conducting the elections.

There is a supervisor of elections who is appointed by the Minister under s. 3 of the Act but he has specific and statutory duties and these do not include the duty of conducting the election in a constituency.

Regulation 10 provides for the appointment of a presiding or deputy presiding officer by the returning officer and the Regulations set out the powers and duties of a presiding officer.

It is necessary to consider the purpose of an election petition and the reasons why the Election Petition Acts and Rules provide for such a petition.

An election petition has really only two purposes and that is either to

- (1) determine whether a person has been validly elected either as the President or as a member of the National Assembly or
- (2) whether a seat in the National Assembly has become vacant.

In so far as this case is concerned the purpose of this election petition is to determine whether Mr. Kibisu has been validly elected as the member of Vihiga constituency.

There is no question here as to the default or personal liability of the returning officer or of other election officers except in so far as the election court is charged under s. 31 to report to the Speaker whether any election offences have been proved. The substantive question here in so far as the returning officer is concerned is whether his conduct of the election has been properly and legally carried out and this must refer not only to his own conduct but to the conduct of those election officials assisting him to carry out the election.

It is our view therefore that the correct interpretation of the words “the conduct of a returning officer” in the definition of the respondent in r. 2 of the Election Petition Rules 1961 must include both his own acts and the acts of the presiding officer or deputy presiding officer who are in fact really assisting the returning officer in the conduct of the election in each constituency.

We therefore dismiss this appeal with costs to be paid by the petitioner to both respondents.

Order accordingly.

For the appellant:

H. N. Slade (instructed by *Hamilton Harrison & Mathews*, Nairobi)

For the first respondent:

S. Sangale (instructed by *S. Sangale & Co.*, Nairobi)

For the second respondent:

K. D. Potter Q.C. (Special Legal and Constitutional Counsel) and *P. M. Gatheru* (State Counsel)

Bhaloo v Republic
[1970] 1 EA 591 (HCT)

Division:	High Court of Tanzania at Dar es Salaam
Date of judgment:	18 February 1970
Case Number:	822/1969 (121/70)
Before:	Georges CJ
Sourced by:	LawAfrica

[1] *Criminal Law – Partnership – Partner not responsible for crimes to which he is not a party.*

[2] *Criminal Law – Sale of agricultural produce – Wholesale and retail sale prohibited – National Agricultural Products Act, 1964, s. 2 (T.).*

[3] *Evidence – Burden of proof – Sale of produce without a licence – Existence of licence an exemption from law creating offence – Burden of proof of existence of licence on accused – Evidence Act, 1967, s. 114 (T.).*

Editor's Summary

The documents concerning the transaction were made out in different names, sometimes in the name of a firm and sometimes in the name of an individual. The appellant produced some of the documents to the investigating officer. The magistrate found the accused guilty as a member of the firm involved in the transaction.

The appellant appealed contending that only wholesale dealings were prohibited by the Act, that it had not been proved that he did not have a licence to deal in the produce, and that a member of a partnership cannot be criminally liable as such.

Held –

- (i) all dealings in produce whether wholesale or retail are prohibited other than sales for the consumption or use of the purchaser or his household;
- (ii) the possession of a licence to deal in the produce would be an exemption from the law creating the offence and so the burden of proving its existence was on the accused;
- (iii) a partner in a firm is not liable for criminal acts of the firm unless he is a party to them;

(iv) on the facts proved, the appellant committed the offence.

Appeal dismissed.

Cases referred to in judgment:

(1) *Williams v. Russell* (1933), 149 L.T. 190.

(2) *R. v. Oliver*, [1943] 2 All E.R. 800.

(3) *John v. Humphreys*, [1955] 1 All E.R. 793.

Judgment

Georges CJ: The appellant in this matter was charged with two offences with respect to breaches of an order made by the National Agricultural Products Board under s. 6 of the National Agricultural Products Board Act (Cap. 567). The order was published as Government Notice 328 of 1968. Section 2 provides:

Every dealing in, barter, offer for sale, sale purchase, or hire of any of the agricultural products specified in the Schedule hereto or their derivatives is hereby prohibited except where such dealing in, barter, offer for sale,

sale, purchase or hire is by the Board, its agents or persons licensed by it, or in the case of an offer for sale or sale, by a producer of such product;

Provided that nothing in this paragraph shall apply to the retail sale or offer for sale of the processed derivatives of any of the agricultural products specified in the Schedule hereto for the consumption or use of the purchaser, his household or persons under his care.

The Schedule lists the following: maize, maize flour, paddy, rice, wheat, wheat flour, cashew nuts.

The penalty provided for breach in s. 4 is a fine of Shs. 2000/- or 6 months imprisonment or both for a first offence and double that for a second or subsequent offence. In addition the agricultural produce may be forfeited to the Republic.

The facts are not basically disputed. On 25 May 1969, A. S. P. Pattani, went to the Dodoma Railway Station where he saw a consignment of 13 tons of rice “addressed to the accused”. On enquiries he “discovered that the accused was provided with the arrival advice slip of this consignment and also the invoice”.

The appellant did not apparently call at the Railway to collect the rice and on 28 May 1969 A. S. P. Pattani visited the appellant “at his shop”. The appellant said that he would not collect the rice and showed the A.S.P. a telegram from “Umoja” of Mwanza asking the Central Region Co-operative to collect the rice. Neither the appellant nor the Central Region Co-operative would collect the rice and eventually the A.S.P. paid the demurrage charges due on the rice and seized it. Mr. Pattani asked the appellant to hand him the documents in connection with the rice shipment. The appellant replied that they were with his lawyer.

Mr. Pattani then went to Mwanza and checked the records of a firm of brokers Messrs. Vasani and Mantar Ltd. There he found copies of two contracts No. 199/69 dated 3 March 1969 – the subject matter of Count 1 and No. 1507/69 dated 15 May 1969 – the subject matter of count 2. Each contract was for the sale of 13 tons of rice to M/S Fazal Nasser Bhaloo, the first by Messrs. Kahama Nzega, Ingembasaku Co-operative and the second by Nyanza Industrial Co. Ltd. Mwanza. From the Co-operative he obtained copies of an invoice, a consignment note (owner’s risk) under which the rice had been railed and a sight draft for payment for it. The sight draft was addressed to “M/S Fazal Nasser Bhaloo” as was the invoice. The consignment note named the consignee as “Mr. Fazal Nasser Bhaloo”. The draft was honoured. The honoured sight draft in respect of contract 199/69 was handed to Mr. Pattani by the appellant’s advocate. Appellant said that he had sold that consignment of rice in retail quantities to a number of buyers. Contract No. 1507/69 was with M/S Fazal Nasser Bhaloo. The consignment note named “Mr. Fazal Nasser Bhaloo” as consignee. The railing advice slip was addressed to M/S Fazal Nasser Bhaloo.

From the National Agricultural Products Board Mr. Pattani obtained an application made by a firm named as “Fazal Nasser Bhaloo and Co.” for a wholesale distributors licence. Four partners of this firm were named in the application – “Fazal Nasser Bhaloo, Abdulmohamed Fazal Nasser, Gulamali Fazal Nasser and Sadru Fazal Nasser”. This application had not been granted. Various witnesses were called to prove the documents tendered by Mr. Pattani.

Mr. Behal’s first contention was that the section did not prohibit purchase of the scheduled products from licensed persons if the products purchased were intended for retail. In effect he was contending that a retailer of these products did not have to be an agent of the Board or licensed by the Board. Unless, therefore, it could be shown that the appellant intended to sell wholesale there could be no offence. The section appears to me to be much wider in its

scope than Mr. Behal would concede. It seems quite clearly to ban all dealings in the scheduled products by any person other than the agents of the Board or their licensees. The proviso excepts only retail sale for the consumption or use of the purchaser, his household and persons under his care. I would hold that every shopkeeper who retails any of the scheduled products must be an agent of the Board or its licensee to enable him in the first place lawfully to purchase the products which he will in turn retail. The customer purchasing from him is exempted under the proviso, but no other dealing is exempted. It is true that the term "retail sale" has not been defined but clearly a consignment of 13 tons of rice could not possibly be thought of as a "retail sale for the consumption or use of the purchaser his household or persons under his care." The dealing in these two consignments of rice would, therefore, be in breach of the order unless both parties were the agents or licensees of the Board.

The second major contention deals with the usually difficult question of burden of proof. Mr. Bethal contended that the prosecution had failed to establish that the appellant was not an agent or licensee of the Board and that the burden was on them to do so. Mr. King contended that the prosecution did not need to do more than prove that there had been a dealing and immediately the burden shifted to the appellant to show that he had the appropriate authority. In support he quoted the Evidence Act 1967, s. 114 which states that the burden is on the person accused of an offence to prove "the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged". The burden is also placed on the accused person of proving on "fact especially within his knowledge".

Neither side quoted any authority on the point. I have not been able to find any direct East African authority but the position is well defined by English authority. In *R. v. Oliver*, [1943] 2 All E.R. 800 the matter was thoroughly reviewed and the Court of Criminal Appeal held that where a person was charged with having sold sugar as a wholesaler without the necessary licence the onus of proving that he had a licence lay on him because it was a fact peculiarly within his own knowledge. Authorities were cited ranging from Hawkins' Pleas of the Crown to *Williams v. Russell* (1933), 149 L.T. 190 to support the proposition. More recently in *John v. Humphreys*, [1955] 1 All E.R. 793 Lord Goddard, C.J., stated that the onus lay upon the person charged with driving a motor car without a licence to prove that he had a licence.

Omrod, J. in a concurring judgement stated:

"I agree, though, I come to the decision with some reluctance, as it does seem an extraordinary position that if a police officer sees somebody driving in the street, he can at once summon him and put him to proof that he has a licence. There is some ground for my reluctance in s. 4 (6) of the Road Traffic Act 1930 which provides that the police may demand a licence, and if the person has not got it, give him an opportunity to produce it in the next five days. My first view was that reading the section as a whole, there must be some evidence to prove that the respondent did not possess a licence. However, having regard to the decision in *R. v. Oliver* (*supra*) it appears to me that there is no alternative but to say that the appeal must be allowed."

These decisions appear to me sound in principle Applied to this case they mean that once there was proof of a dealing in rice in wholesale quantities it was up to the appellant to prove that he was an agent or licensee of the Board. He has failed to do this.

The aspect of this case which has given me greatest concern is that of the identity of the accused person. The appellant was charged under the name

Gulamali Fazal Nasser Bhaloo. All the documents save one tendered in connection with both transactions were addressed to M/S Fazal Nasser Bhaloo. There is apparently a firm Fazal Nasser Bhaloo & Co. as appears from Exh. A – the application for a wholesale Distributors Licence tendered by the prosecution. None of the partners of that firm have quite the same name as the appellant. There is a Fazal Gulamali Bhaloo and a Gulamali Fazal Nasser but no Gulamali Fazal Nasser Bhaloo.

Mr. Behal submitted with much force that the documents would show that a firm was involved and that there was no evidence that ‘the appellant was a member of that firm. No extract from the Register of Business Names was tendered. None of the persons who came to give evidence of the making of the contract or the shipment of the goods knew the appellant personally. The trial magistrate did not appear to appreciate the difficulty until the submission of no case was made. He dealt with it as follows:

“The last submission of the learned counsel appears to be attractive. I have scrutinised all the relevant documentary exhibits and the rice in question appears to have been addressed to M/S Fazal Nasser Bhaloo & Co. This is a firm in which the accused is a partner. The signature on Exhibit A is not denied to be that of accused and he has signed the application for wholesale distribution licence as a partner. A partner is liable severally and jointly for the acts of the firm and/or Co-partners done in the course of business. Accused has therefore been rightly charged.”

This passage can be faulted in several particulars. To begin with the appellant did not have to prove that the signature on the application form for the wholesale distributor’s licence was not his. It was for the Republic to prove that it was his. Until there was prima facie evidence that it was his, non-denial could not help in establishing anything. The only evidence that the signature was his was that of Mr. Pattani. He said in examination-in-chief:

“I asked the accused to produce the distributor’s licence but he has failed to do so. I made enquiries at the National Agricultural Board, Dar es Salaam and I also contacted one Mr. Kombe of the Board by telephone and he sent to me two documents. One of these documents is an application form submitted by the accused firm (sic) grant of distributor’s licence. The second document is the reply to the application form.”

Mr. Kombe also gave evidence on that point. He stated:

“This is an application form submitted by Fazal Nasser Bhaloo of Dodoma on 20 December 1968. I advised Fazal Nasser Bhaloo that it was not possible to grant him the licence. This is the letter I sent him.”

In fact the letter produced was not the original letter sent but a copy of it. Mr. Pattani’s evidence on that point was clearly not valuable. He did not, and indeed I imagine could not, identify the signature of the accused as the trial magistrate seemed to have thought that he had. His statement that the accused had submitted the application was an inference quite unsupported by any fact to which he had deposed. Indeed, had advocate for the defence objected to the admissibility of these copies on the ground that no proper basis had been laid I do not see how the application could have been properly refused. The accused himself had produced no documents.

Mr. Kombe’s evidence did not go any further. He spoke of an application by Fazal Nasser Bhaloo of Dodoma but he did not link the accused with that applicant. In those circumstances the silence of the accused about these documents could not turn what had been said about them into proof.

Secondly a partner is not liable for breaches of the criminal law committed by his firm unless he is in some way by commission or culpable omission – a party to them. The doctrine that a partner is liable severally and jointly for the acts of the firm is one applicable only as far as civil liability in tort or contract is concerned.

In his judgment the trial magistrate repeated this principle which is in my view erroneous. He went on to point out, correctly, that some of the documents bore the name M/S Fazal Nassor Bhaloo and some of them Fazal Nassor Bhaloo alone. He then added:

“This is clearly a design to evade the application of the law. In these circumstances I don’t consider that the charge has been misconceived.”

I entirely understand the feelings of the trial magistrate and indeed sympathise with them. On the other hand the fact that one may sense correctly that there is a design to evade the law clearly does not relieve the prosecution of the onus of proving that the person charged is guilty beyond a reasonable doubt of the offence with which he has been charged. The cleverness of the accused must be matched by the cleverness of the prosecution in blowing away the smoke screen of deception laid down to conceal the identity of the true offender.

I think, however, that there are two matters of much significance linking the appellant with the firm and with the transactions which have not been mentioned. In his evidence Mr. Pattani states:

“I asked the accused how he had affected (sic) the payment of rice which he had received from Kahama Nzega Igembesabu Union. His defence counsel handed over to me a side (sic) draft which I now produce. The copy of the invoice entered is attached and marked Exh. M. I asked the accused to produce the documents showing how he had disposed of 13 tons of rice received from Kahama Nzega Igembesabu Union. Accused told me that he had sold the rice to different persons. He also told me that he had sold the rice in retail price.”

This is a clear admission that the appellant was deeply concerned in the purchase and subsequent resale of the rice which forms the subject matter of the first count. In that transaction as in the second the rice was consigned to M/S Fazal Nassor Bhaloo yet the applicant had in possession documents showing that it had been paid for and he admitted having sold it. Further when questioned on the second shipment in May he produced telegrams purporting to show that the rice had been consigned to the Central Region Co-operative – a statement which the representative of the Co-operative denied. He also stated that the documents relating to that shipment were with his lawyers. This establishes knowledge on his part of the arrival of the consignment of rice. When one adds to that the near identity of documentation between the second dealing in May and the earlier dealing in March one would be entitled, on a proper direction, to conclude that the appellant was a party to the second transaction sufficiently involved to hold him criminally liable.

Accordingly the three major points argued on behalf of the appellant all fail and the appeal must be dismissed.

Mr. Behal asked that the order for the forfeiture of the rice should be cancelled. I see no reason to do this. The rice has been sold to the appellant’s firm. Should the forfeiture be cancelled it will be given to him to sell in breach of the very order with which he has been charged. The court would in effect be making itself a party to a successful breach of the order. The forfeiture is confirmed.

The appellant was fined Shs. 1000/- on each count. Mr. Behal pointed out that in a similar case in Dodoma fines of Shs. 200/- and Shs. 500/- had been

imposed and that the fines here were excessive – particularly bearing in mind that rice worth over Shs. 20,000/- had been confiscated on the second count. I do not think that the fine on count 1 was excessive. It was a large transaction successfully completed and without doubt the profit on it would have been more than the fine imposed. On the second count taking into account the fact that the rice has been confiscated I would reduce the fine to one of Shs. 500/-. Otherwise the appeal is dismissed and the sentences confirmed.

Order accordingly.

For the appellant:

M. D. Behal (instructed by *Madan Behal & Co., Dodoma*)

For the respondent:

N. King (Senior State Attorney)

Dar Es Salaam Motor Transport Co Ltd v Mehta and others
[1970] 1 EA 596 (HCT)

Division:	High Court of Tanzania at Dar es Salaam
Date of judgment:	22 May 1970
Case Number:	27/1969 (122/70)
Before:	Georges CJ
Sourced by:	LawAfrica

[1] *Carriage – By road – Loss of goods – Whether carriers reserving right to refuse to carry goods common carriers and therefore not liable as insurers.*

[2] *Carriage – By road – Contract – Exemption clause – Loss of goods – Acceptance of goods subject to conditions of carriage – Whether and when carriers exempted from liability for loss.*

[3] *Contract – Exemption clause – Loss of goods – Acceptance of goods subject to conditions of carriage – Whether and when carriers exempted from liability for loss.*

Editor's Summary

The appellant a transport company failed to deliver to the respondents parcels of cloth which had been consigned to them. The words “All parcels accepted and carried subject to the conditions of carriage” appeared on consignment notes issued by the appellants. Under the conditions of carriage which were displayed on notice boards in their premises the appellants reserved to themselves an unfettered discretion to refuse to carry any goods for any reason whatsoever. They also purported by notice to exempt themselves from liability for any loss, injury or delay in respect of any goods. There was no

evidence that parcels had ever been refused and although the receipt given referred to conditions of carriage, it did not say where these were to be found.

Held –

- (i) a transporter who behaves like a common carrier cannot remove himself from that category by stating that he is not a common carrier;
- (ii) the conditions exempting the appellants from liability were not sufficiently brought to the attention of the respondents or their agents to make them part of the contract, [*Watkin v. Rymill* (1) distinguished].

Appeal dismissed.

Cases referred to in judgment:

- (1) *Watkin v. Rymill* (1883), 10 Q.B.D. 178.
- (2) *Belfast Ropework Company v. Bushell*, [1918] 1 K.B. 210.

Judgment

Georges CJ: The respondents in this appeal are all businessmen trading at Mbeya. The appellant is a transport company operating buses on many routes in Tanganyika – among them the Dar es Salaam to Mbeya route. In each case the appellant failed to deliver to the respondents at Mbeya parcels of cloth which had been consigned to them. Each respondent filed a claim for damages and these claims were consolidated. On 23 December 1966 the Senior Resident Magistrate Mbeya delivered judgment in favour of the plaintiffs. There was a successful appeal and a new trial was ordered. On 23 October 1968 judgment was again delivered in favour of the respondents and there is again an appeal to this court.

The first question for determination is whether or not the appellants are common carriers. The law defining common carriers is the same here as in England and the trial magistrate correctly directed himself in the terms set out in Halsbury's Laws of England (3rd Edn.) Vol. IV at pp. 130-131. The evidence before him could reasonably be said to support the finding that the appellants in fact accepted parcels for carriage without reservation. One clerk stated that the company might refuse to carry a parcel for a prospective customer if that customer were 'rude'. This remark at best can only be described as being extremely vague. There was no instance given of refusal for that reason. The trial magistrate was entitled to place little weight upon it.

There were, however, conditions of carriage which were displayed on a notice board in the appellant's office in Dar es Salaam where the parcels in each case were handled in for despatch. One of the conditions read (quoting from the trial magistrate's judgment):

"The company may in its own unfettered discretion refuse to carry any consignment or any part thereof, or any goods delivered for carriage if such goods are in the opinion of the company of an offensive, dangerous, inflammable or explosive nature or in the case of goods desired by the consignee to be taken from one territory to another which are subject to customs restriction, or for any other reason whatsoever."

Mr. Lakha argues that this clause clearly takes the appellants from the class of common carriers because it reserves to them the right to select what they carry. The trial magistrate did consider this. He concluded that the clause did no more than reserve to the company the right to refuse to carry goods for reasons which were clearly sound. Mr. Lakha states that this view is untenable in the light of the final words in the clause, "or for any other reasons whatsoever" which ought not to be interpreted ejusdem generis and should be held to confer on the company an unfettered discretion.

I cannot say that the magistrate misdirected himself in holding that the appellants were common carriers. The test has been laid down by Bailhache, J. in *Belfast Ropework Company v. Bushell*, [1918] 1 K.B. 210 as follows:

"Did the defendant while inviting all and sundry to employ him, reserve to himself the right of accepting or rejecting their offers of goods for carriage whether his lorries were full or empty being guided in his decision by the attractiveness or otherwise of the particular offer and not by his ability or inability to carry having regard to other engagement."

The clause in the notice does no more than state that the appellant reserved to himself the right to refuse troublesome cargo. They could give no instance of their having in fact refused a parcel – some indication of the manner in which the clause is fact worked. A transporter who behaves like a common carrier cannot remove himself from that category by stating that in fact he is not a common carrier. The conduct of his business must be consistent with description of himself.

The trial magistrate's finding that the appellants are common carriers which is a question of fact can be supported on evidence and I would uphold it.

As a common carrier the appellants would be liable as insurers of the goods which they undertake to carry but they can by contract vary their liability for loss, injury or delay in respect of such goods.

The second issue is whether the appellants did effectively limit their liability in these particular transactions. The trial magistrate held that there was no indication that the parties had entered into a special contract.

One of the respondents, Mr. Mehta, testified that he had delivered the parcel himself to the appellants' depot in Dar es Salaam and had signed a consignment note which was in English and which he did not understand. This was tendered. It bears on the face of it immediately below Mr. Mehta's signature the words "All Parcels Accepted and carried subject to the condition of carriage." There was a similar consignment note in the case of Abdul Sattar Haji Ayoob signed by his agent Salum Abdullah and in the case of Haji Abubakar Tarmohamed signed by an employee of the consignors who he admitted was acting as his agent.

Tarmohamed denied having been into the offices of the appellant company in Dar es Salaam. He had visited the office at Mbeya but had never seen any board there specifying conditions of carriage of goods.

Mr. Mehta said he could not read English and had never seen any board at the company's office bearing conditions of carriage.

Abdul Sattar Haji Ayoob died before the action was heard. An attorney represented the executor. There was no evidence whether the deceased had been aware of any notice.

Two employees of the company testified that notices were displayed in front of the counter of all offices of the appellant company stating in English and Swahili the conditions of carriage.

Mr. Lakha argues that the trial magistrate appears not at all to have considered whether the carriage in this case was by special contract. The criticism is some-what justified. The judgment merely asserts that there was no indication that there was a special contract.

On a reading of the whole judgment it can fairly be said, however, that the trial magistrate was of the opinion that the conditions had not been adequately brought to the attention of the plaintiffs or his agents. This is a finding quite justifiable on the facts proved.

The receipt does specify that parcels were accepted and carried subject to the conditions of carriage. It did not specify where the conditions were to be seen.

In *Watkin v. Rymill* (1883), 10 Q.B.D. 178 the notice stated that the contract was subject to conditions as exhibited on the premises. There were printed notices prominently displayed on the premises. Here there was evidence of notices on the premises. Accepting that they were prominently displayed there was no evidence that the respondent saw them and the receipt did not specifically draw attention to them as in the case of *Watkin v. Rymill*. I would accept as a correct formulation of the law here a passage in Anson on Contract (22nd Edn.) at p. 146:

"It is not sufficient simply to put up a printed notice containing exempting clauses; the party relying on the notice must go further and show affirmatively that it was a contractual document and accepted as such by the party affected."

The company here should have specifically stated in the receipt that the conditions were exhibited in the premises or the clerk attending to customers should tell them that the conditions referred to were those set out in the notices.

The finding implicit in the trial magistrate's judgment that the conditions were not brought home sufficiently to the respondents to make them part of the contract is correct.

The liability of the appellants was, therefore, that of a common carrier which is admittedly that of an insurer and the trial magistrate was correct in so concluding.

Mr. Lakha pointed out that the judgment in two of the cases had been entered for the wrong amount. In the case of the first plaintiff it should have been for Shs. 3,048/75 and not for Shs. 3,086/75 and in the case of the third plaintiff it should have been for Shs. 1,709/25 and not for Shs. 1,729/10. He stated quite rightly that a carrier was not liable for loss of profit.

The sums for which judgment was entered appear to me correct. In the case of the first plaintiff it includes freight at 35/- and 3/- the price of a new bag in which the goods had been packed. In the case of the third plaintiff it included freight at 19/85.

Accordingly the appeal is dismissed in its entirety.

For the appellant:

A. A. Lakha (instructed by *Fraser Murray, Roden & Co.*, Dar es Salaam)

For respondents:

N. P. Patel and Ranbir Singh (instructed by *J. S. Manek*, Mbeya)

Nilsson v Republic
[1970] 1 EA 599 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	25 May 1970
Case Number:	330/1970 (123/70)
Before:	Harris J
Sourced by:	LawAfrica

[1] *Criminal Practice and Procedure – Sentence – plea in mitigation – Magistrate may not question accused.*

[2] *Criminal Practice and Procedure – Sentence – Guilty plea to be considered in mitigation.*

[3] *Traffic – Driving under the influence of drink – Sentence – Nine months imprisonment for first offence – Whether excessive.*

Editor's Summary

The appellant appealed against a sentence of nine months imprisonment for driving a motor vehicle while under the influence of drink on the following grounds:

That the magistrate had made no enquiry into the appellant's lack of ground before sentencing him; that he had failed to direct his mind to the circumstances of the appellant's case; that a fine should be considered the more usual punishment for the offence; that the appellant was a first offender and had pleaded guilty and the sentence was therefore manifestly excessive.

Held –

- (i) a sentence of imprisonment may be imposed without a fine for the offence charged;
- (ii) a magistrate may only record the plea in mitigation made by an accused and may not question him thereby possibly bringing to light matters to his discredit;
- (iii) the fact that an accused pleads guilty should be taken into account in assessing sentence;

(iv) in the circumstances the sentence was manifestly excessive.

Appeal allowed.

Sentence reduced to one month which had already been served.

Cases referred to in judgment:

(1) *Ogalo son of Owoura v. R.* (1954), 21 E.A.C.A. 270.

Judgment

Harris J: This is an appeal against the sentence of nine months imprisonment, together with a disqualification from holding or obtaining a driving licence for two years, imposed on the appellant in the magistrate's court of the second class at Nairobi on 14 April 1970, for the offence of driving a motor vehicle while under the influence of drink to such an extent as to be incapable of having proper control of the vehicle, contrary to s. 44 (1) of the Traffic Act (Cap. 403).

The material facts to the somewhat limited extent to which they have been proved or admitted are simple and can be shortly stated. At about a quarter past five on the afternoon of 13 April of this year the appellant was driving his private car along Kenyatta Avenue from Uhuru Highway in the direction of the junction with Koinange Street, the traffic on which at the time was controlled by a police constable on point duty. As he reached the junction the constable signalled for the traffic coming along Kenyatta Avenue to halt and for the traffic waiting to emerge from Koinange Street to proceed. The appellant failed to respond to the constable's signal and moved forward towards the oncoming traffic emerging from Koinange Street, which resulted in his car coming into contact with another car and each vehicle was slightly damaged but nobody was injured.

The appellant immediately got out of his car and was arrested by the police who, considering him to be unsteady on his feet and smelling of alcohol, took him to a police station where he was medically examined. There is no conclusive evidence as to the degree of intoxication from which he was suffering or as to the quality or quantity of alcohol which he had consumed, but he was detained in custody for the night, taken to court next morning and charged with the offence to which these proceedings relate. Having apparently received some advice as to the position from the police he elected to be tried without the benefit of legal representation and at the hearing he pleaded guilty to the charge and was convicted. He then made the following statement to the magistrate, as recorded:

"I had been drinking one large Pilsner beer. After I finished drinking I had awful serious headache. I took two pills containing codeine. After half an hour the pain had not gone so I took two more pills. I was feeling dizzy due to the drugs which I had taken. That's all I have to say. I have been driving in Kenya for 1 year."

The appellant concedes that this version of what he said is substantially correct except that he maintains that the sentence "I was feeling dizzy due to the drugs which I had taken" should be immediately prefaced with the words "After the accident". Save for the inability of the prosecution to accept the insertion of these three words the parties are *ad idem* on the material facts, each having agreed that for the purpose of this appeal the record of the proceedings in the court below should be accepted as an accurate account of what occurred in that court.

In opening his case for this court counsel for the appellant placed reliance principally upon the following three grounds of appeal, namely, that the magistrate:

- (1) had misdirected himself as to the extent and legality of the sentence imposed;
- (2) had failed to make any proper inquiry as to the appellant's background, family, previous driving record, health, or other facts which should have been considered in mitigation of sentence; and
- (3) had failed to direct his mind to any of the facts and circumstances of the appellant's case and, instead, had wrongly directed his mind solely to the general problem of deterrent sentences for driving under the influence of drink.

On this basis the appeal proceeded and the court is appreciative of the considerable assistance given to it by counsel for the parties.

Before an appeal against sentence can succeed this court must be satisfied that there exist to a sufficient extent circumstances entitling it to vary the order of the court below. These are stated in *Ogalson of Owoura v. R.* (1954), 21 E.A.C.A. 270, a decision upon which I understood both counsel to rely, in the following words:

“The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless, as was said in *James v. R.* (1950), 18 E.A.C.A. 147, ‘it is evident that the Judge has acted upon some wrong principle or overlooked some material factor.’ To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: *R. v. Shershewsky* (1912), C.C.A. 28 T.L.R. 364.”

The first submission for the appellant was based upon the penalty provision in s. 44 (1) of the Traffic Act which states that a person found guilty of an offence under the section shall be “liable to a fine not exceeding Shs. 5,000/- or to imprisonment for a term not exceeding 18 months, or to both such fine and such imprisonment”. The fact that the reference to a fine precedes the reference to imprisonment, it was submitted, indicates that a fine and not imprisonment should be regarded as what the Legislature intended to be the more usual punishment and that accordingly the magistrate should not, as a matter of practice, have imposed a sentence of imprisonment without at least the option of a fine. Clearly the draftsman of the section had perforce to mention one of these two punishments before the other and by putting them in the order in which he did he may have been doing no more than placing them in alphabetical sequence. However that may be, I can see no persuasive ground for drawing the inference suggested and am satisfied that the magistrate was fully empowered to impose a sentence of imprisonment either with or without a fine.

The next submission was that before imposing sentence the magistrate should have enquired further as to the circumstances surrounding the offence and put to the appellant all necessary questions for this purpose, including in particular the enquiry which he made in his judgment as to why the appellant, if he felt impaired by the tablets and alcohol which he had consumed, should have taken it upon himself to drive a motor car in the centre of the city in that condition. Notwithstanding that there is no statutory obligation upon him to do so the magistrate manifestly followed the usual practice of hearing and recording

faithfully what the appellant had to say in mitigation or explanation of his offence, and the accuracy with which the magistrate did so is evidenced by the fact that the only criticism which the appellant had to offer of the magistrate's note was by way of a request to add the three words already mentioned.

So far from being expected to cross-question a convicted person for the purpose of determining what sentence to impose, a magistrate is not empowered to do so and it would be quite improper for him to adopt such a course, thereby possibly bringing to light matters to the discredit of the accused. In my view a magistrate fully discharges his obligations in regard to ascertaining the circumstances surrounding a convicted person and his offence by inviting that person to speak in his defence and adjourning the proceedings if requested to enable the accused to seek the services of an advocate. Here there can be no compulsion and if a person charged with an offence prefers for any reason not to be professionally represented the choice is his. Although there is some sense in the old saying that a man who acts as his own lawyer has a fool for a client nevertheless in practice the great majority of persons who are tried in subordinate courts are not legally represented.

Counsel for the appellant then turned to a consideration of the language used by the magistrate in imposing sentence. He criticised the magistrate's use of the word "dangerous" to describe the manner of driving the vehicle at the time of the accident, but in my opinion, although the prosecutor had not used that term, it is a fair description of the appellant's conduct in driving the vehicle as he did in a main thoroughfare of Nairobi at a very busy hour on a week-day afternoon, failing to observe a police signal and colliding with another car. Had that collision been with a cyclist or pedestrian a very serious accident might have resulted. The charge, however, was not one of dangerous driving.

In my opinion none of the foregoing grounds is of itself sufficient to justify this court in interfering with the sentence imposed by the court below and it remains now to consider whether, apart from the bases upon which it was reached, that sentence is in all the circumstances manifestly excessive. In dealing with this question I have before me certain facts and submissions, unconnected with the actual commission of the offence, which were not brought before the magistrate although they might well have been had the appellant seen fit to present them.

The first of these considerations is the appellant's personal circumstances. To a very wealthy man a fine of, let us say, one thousand pounds might be nothing more than a source of irritation while to one in less affluent circumstances it could spell ruin to himself and his family. Similarly to a person having little sensitivity and a lengthy and varied prison record a further term of imprisonment might hold few terrors while to one lacking in these attributes a prison sentence, however short, might constitute a penalty of the greatest severity. That is why it is of assistance to a court in imposing punishment to be informed by the accused of all such relevant facts about himself. Although there is nothing on the record to suggest that the matter was brought to the knowledge of the magistrate, it now appears, and is not denied by the prosecution, that the appellant is a qualified teacher of mathematics in a well-known science college in Nairobi, that he is in this country by virtue of a technical aid scheme, and that his contract of service under the scheme is due to expire in about nine months from now, that is, at approximately the same time as the sentence against which he is appealing.

Another factor in the case, which it is well settled should be taken into account when determining a question of sentence, is that the appellant frankly pleaded guilty to the charge, thereby saving the prosecution the trouble and expense of proving its case and avoiding the possibility of the appellant securing an unmerited

acquittal through a technical or procedural error. To this must be added the fact that the appellant has no prior conviction for any offence in this country. Neither of these facts was referred to by the magistrate in his judgment and they may possibly have been overlooked.

In mentioning these mitigating features I have omitted two other matters which were canvassed in this court. The first is the speed with which the proceedings in the court below were conducted, as a result of which the appellant found himself convicted and already serving his sentence within less than twenty-four hours of committing his offence. I see no hardship in this, for had the appellant sought an adjournment, whether for the purpose of obtaining legal representation or securing witnesses to give evidence as to character or otherwise, a full opportunity to do so would, I have no doubt, have been afforded. It has frequently been said by way of complaint that accused persons are kept in suspense for unreasonably long periods awaiting trial. This is the first occasion that I can recall upon which I have heard the converse put forward, also as a complaint.

The second matter urged by way of mitigation to which I have not referred is the fact that the appellant is married and has three small children. This argument, so often pressed, is curiously illogical, suggesting, as it does, that the degree of criminality attaching to a breach of law is in some way lessened if the perpetrator is married and lessened even further if he is a father. The more realistic approach would seem to be that a man who is married and a father should for that very reason give some additional thought to his position and to that of his wife and children before permitting himself to become embroiled with the criminal law.

Leaving aside these last-mentioned considerations, I am satisfied that the sentence imposed by the magistrate, and described by him in his judgment as “a most severe punishment”, is, in the particular circumstances of this case, quite excessive. In saying this, however, I am not to be taken as disagreeing with his observations as to the necessity to punish appropriately persons who in one degree or another render the public roads of this country places of danger to other users or as to the duty of magistrates in that regard.

Having given the matter full consideration and bearing in mind that counsel for the prosecution very properly indicated that he was not seeking fully to support the sentence, I will allow the appeal to the extent of substituting for the sentence imposed by the court below a sentence of one month’s imprisonment. That portion of the original sentence which has already been served will, of course, be taken into account in relation to this substituted sentence. The disqualification from holding or obtaining a driving licence for two years will remain.

Appeal allowed.

For the appellant:

Sir William O’Brien Lindsay (instructed by *Hamilton Harrison & Mathews*, Nairobi)

For the respondent:

E. N. Njatha (State Counsel)

Division: High Court of Kenya at Nairobi
Date of judgment: 28 April 1970
Case Number: 914/1969 (124/70)
Before: Chanan Singh J
Sourced by: LawAfrica

[1] *Civil Practice and Procedure – Originating summons – summons provided for by statute – Mohammedan Marriage Divorce and Successive Rules, r. 2 (K.).*

[2] *Civil Practice and Procedure – Summons – Meaning of.*

[3] *Civil Practice and Procedure – Irregularities – Waiver – Of incorrect originating process – Waiver not possible.*

[4] *Civil Practice and Procedure – Originating process – Incorrect – Must be struck out.*

Editor’s Summary

Application for the dissolution of a Mohammedan marriage was made by originating summons under the Mohammedan Marriage Divorce and Succession Rules, r. 2. Appearance was entered by the defendant and a defence filed. The defendant then contended that the proceedings were improperly instituted and should be struck out:

Held –

- (i) where a statute requires a proceeding to be originated by a summons this means an originating summons (*Boyes v. Gathure* (6) followed);
 - (ii) a summons may either be a summons by a court to a defendant to do an act or it may be an application to a court for relief;
 - (iii) “summons” in The Mohammedan Marriage Divorce and Succession Rules, r. 2 is a summons to be issued by the court, not a summons originating a proceeding.
 - (iv) the use of an incorrect originating process cannot be waived by the appearance of the defendant or the filing of a defence;
 - (v) the court itself may and should strike out process incorrectly originated.
- Application struck out.

Cases referred to in judgment:

- (1) *Jethalal Oil Mills and Soap Factory Ltd. v. Colonial Oil Mills*, C.C. 22 of 1956 (unreported).
- (2) *Namukasa v. Bukya*, [1966] E.A. 433.
- (3) *Kigoya v. Attorney-General of Uganda*, [1966] E.A. 463.
- (4) *Leslie and Anderson v. Hoima Ginners*, [1967] E.A. 44.

(5) *Prabhudas & Co. v. Standard Bank Ltd.*, [1968] E.A. 670.

(6) *Boyes v. Gathure*, [1969] E.A. 385.

Judgment

Chanan Singh J: The plaintiff has taken out this originating summons asking for the dissolution of his marriage with the defendant. Mr. D. N. Khanna, who appears for the defendant, has taken objection that an originating summons is not the proper process in this case and that the summons should be struck out.

Mr. Le Pelley, who appears for the plaintiff, gives a four-fold answer to Mr. Khanna's objection.

First, he says that the originating summons is a general process, not confined to matters specified in O. 36. I agree that an originating summons can be used in cases not specified in O. 36 but such other use must be authorised by some statute. That, I believe, is the ratio decidendi of the Court of Appeal judgment in *Boyes v. Gathure*, [1969] E.A. 385, which was an appeal from one of my own decisions. The Court of Appeal in that case said no more than that where a statute requires a proceeding to be commenced by “summons” then it should be commenced by “originating summons, if there is no suit in existence, or by interlocutory summons, if there is” (at p. 387, *per* Spry, J.A., as he then was).

Secondly, he argues that the Mohammedan Marriage, Divorce and Succession Rules authorise the commencement of proceedings by “summons”. He refers to r. 2 which reads:

“2. A summons shall issue in all suits under the Act.”

Now, the rules to which Mr. Le Pelley has drawn my attention were made under s. 7 of the Mohammedan Marriage, Divorce and Succession Act (Cap. 156) which empowers the Chief Justice to make rules inter alia “for the better carrying into effect of the provisions of this Act; and . . . assimilating, if he deems fit, as far as may be, the existing practice under the Matrimonial Causes Act to all or any of the matrimonial causes or suits under this Act.”

The Matrimonial Causes Act requires divorce proceedings to be commenced by petition. The rules now in question quite clearly did not intend that that procedure should apply to Mohammedan marriages. But, with respect, I think Mr. Le Pelley misunderstands the meaning of the word “summons” in r. 2. The word has two distinct meanings in law.

- (1) It means a document issued *by* a court ordering a person to whom it is directed to attend before a judge or officer of the court or ordering the defendant to a suit to enter appearance.
- (2) It is a form of application made *to* a court by a person claiming some relief or seeking some order.

In my opinion, Mr. Le Pelley’s originating summons is a “summons” in the second sense. Rule 2 of the Mohammedan Marriage, Divorce and Succession Rules on which he relies uses the word in its first sense. When a suit is filed, the document issued by the court to be served on the defendant along with the plaint is a summons under O. 5, r. 1 (1) (a) which reads:

“When a suit has been duly instituted a summons may be issued to the defendant (a) ordering him to enter appearance within a time to be specified therein; or . . .”

This summons accompanying a plaint is a summons of the first kind described by me. Rule 32 of the same Order (which reads “Applications under this Order shall be by summons in Chambers”) uses the word in the second sense.

I hold therefore that “summons” in r. 2 means a summons in a suit as in O. 5, r. 1, not a summons originating a proceeding.

Thirdly, Mr. Le Pelley argues that if the originating summons has been incorrectly or irregularly taken out by him then the incorrectness or irregularity should be taken as waived by Mr. Khanna’s client who has entered an unconditional appearance and filed a defence.

I agree that it might have been better if the defendant had entered a conditional appearance indicating her objection to the form of pleading. Although our rules of procedure provide for the entering of a conditional appearance in certain specified matters only (e.g. partnership suits under O. 29, r. 7, matrimonial causes under r. 13 of the Matrimonial Causes Rules) and not in general civil

matters covered by O. 9 and O. 36; yet the Court of Appeal has recognised the practice that has prevailed in these courts over many years of entering such an appearance in all matters – see *Prabhudas (N.) & Co. v. Standard Bank*, [1968] E.A. 670, at p. 684 overruling MacDuff, J., who in *Jethalal Oil Mills and Soap Factory Ltd. v. Colonial Oil Mills Ltd.*, civil case 22 of 1956 (unreported) had held that an unconditional appearance did not waive an irregularity and affirming Harris, J., who following his own decision in *Leslie and Anderson v. Hoima Ginnars*, [1967] E.A. 44 had held that an unconditional appearance had had the effect of waiving any irregularity in the service of summons.

In his judgment in the *Prabhudas* case Sir Charles Newbold, P., stated:

“In my view, where a defendant chooses to enter an unconditional appearance in proceedings in the court, he must be taken, save in exceptional circumstances such as where he contemporaneously files a notice of motion to set aside the proceedings to which he has entered an appearance, to have waived any irregularity in the process to which he enters an appearance and thus he accepts the jurisdiction of the court.” (At p. 684.)

The phrase “any irregularity in the process” might seem to – but does not in my view – cover cases where a wrong originating process is used. The actual effect of the decision of Sir Charles Newbold, concurred in by the other members of the court, was “that the defendant has, by entering an unconditional appearance, waived his right to object to the two irregularities” involved. These were: (i) wrong court’s seal affixed on the summons; (ii) summons, instead of the notice of a summons, served upon the defendant.

In my opinion, a defendant cannot, by entering an unconditional appearance, be said to have waived the irregularity involved in the use of a wrong originating process. Even if the defendant be taken, by entering an unconditional appearance and filing a defence, to have waived the irregularity, the court is entitled suo moto to take objection to the use of a wrong originating process.

Fourthly, Mr. Le Pelley says that even if the originating summons was irregularly taken out and even if the irregularity was not waived by the defendant, it is not an irregularity for which the proceedings should be struck out. He quotes *Boyes v. Gathure* (*supra*) again for the proposition that wrong process does not necessarily invalidate proceedings. In that case, the respondent had taken out a “summons” in the form used for interlocutory summonses asking that a caveat filed in the land registry be extended under s. 57 of the Registration of Titles Act (Cap. 281). The Act prescribes a “summons” for this purpose. The Court of Appeal held that an “originating summons” should have been taken out but it refused to strike out the “summons” because, as Spry, J.A. put it (at p. 387), “the error of procedure” was not a ground for interfering with the decision of the High Court “since no prejudice whatever was caused to the appellant”.

The judgment of the Court of Appeal came, naturally, after the decision of the High Court. Spry, J.A., left no doubt as to what in his opinion the High Court should have done. He said this at p. 387:

“I would make it clear that I think the learned judge was entitled to reject the application and, indeed, should have done so.”

This seems to mean that although the Court of Appeal may not set aside a correct decision taken by the High Court on a wrong form of application the High Court itself should reject an application made in a form which is as different from the correct form as an ordinary summons is from an originating summons. Spry, J.A., referred with approval to the substance of the decisions of the High Court of Uganda in *Namukasa v. Bukya*, [1966] E.A. 433 and *Kigoya v. Attorney-General*

of *Uganda*, [1966] E.A. 463 in both of which applications in wrong form were ordered to be struck out.

In the present case, I am satisfied that the proceedings have not been properly commenced by originating summons. The proper form of proceedings might be a plaint or a petition depending on the nature of the union that subsists between the parties. I am not required to decide the proper form of proceedings, nor indeed to decide whether this court has jurisdiction at all to entertain proceedings. Those questions will receive consideration if and when they fall for decision.

I hold, therefore, that an originating summons in this case is misconceived.

Application struck out.

For the plaintiff:

P. Le Pelley (instructed by *Hamilton Harrison & Mathews*, Nairobi)

For the defendant:

D. N. Khanna (instructed by *Khanna & Co.*, Nairobi)

Zakayo v Naomi
[1970] 1 EA 607 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	16 July 1970
Case Number:	1954/1968 (126/70)
Before:	Chanan Singh J
Sourced by:	LawAfrica

[1] *Restitution – Stolen money – Paid to defendant by thief – Money recoverable.*

Editor's Summary

The plaintiff sued the defendant for money had and received. The money had been paid into the defendant's bank account on the day that her son stole a larger sum from the plaintiff. On the evidence the judge found that the money paid into the defendant's account was part of the money stolen from the plaintiff. The defendant claimed that as there was no privity of contract between the plaintiff and the defendant, the money could not be recovered.

Held –

- (i) the owner of money can either sue the thief in tort or he can sue the receiver of the money in quasi-contract;
- (ii) in suing the receiver the owner does not waive the tort, but claims on the basis of the tort (*United*

Australia Ltd. v. Barclays Bank Ltd. (2) followed);

(iii) a promise to repay is imputed by law in such a case and the plaintiff was entitled to recover.

Judgment for the plaintiff.

Cases referred to in judgment:

(1) *Sinclair v. Brougham*, [1914] A.C. 398.

(2) *United Australia Ltd. v. Barclays Bank Ltd.*, [1941] A.C. 1.

(3) *Reading v. Attorney-General*, [1951] A.C. 507.

Judgment

Chanan Singh J: [The judge reviewed the evidence, found that the money claimed had been stolen by the defendant's son from the plaintiff and continued.]

Mr. Joshi, who came into the case at a late stage to represent the defendant, has in his final address raised a legal point with which I must now deal. He has drawn my attention to Atkin's Court Forms which in the section dealing with "Money Had and Received" (Vol. 27, 2nd Edn., pp. 195-196) gives four

conditions which “must generally be satisfied in a claim for money had and received”. The first is: “The defendant must have received a definite and an ascertained sum of money.” This condition is satisfied. The second condition is: “the money received by the defendant must be either the plaintiff’s own money or money in which the plaintiff is directly interested.” This condition is also satisfied. The third condition is: “the money or its equivalent must be clearly proved to have come into the defendant’s hands.” I have found that this condition is also satisfied.

But there is a fourth essential which Mr. Joshi contends is not satisfied in this case. This is how it reads:

“There must be privity of contract between the plaintiff and the defendant, even if the defendant is wrongfully in possession of money held for the benefit of the plaintiff, or is in possession of the plaintiff’s own money: the relationship on which the quasi-contractual obligation is based must be between the plaintiff and the defendant.”

The point raised by Mr. Joshi is highly technical but is relevant. I think the reason for the fourth condition is that the historical basis for the claim of money had and received was the old action of *assumpsit*.

The questions of principle involved were discussed at great length in two House of Lords cases, *Sinclair v. Brougham*, [1914] A.C. 398 and *United Australia Ltd. v. Barclays Bank Ltd.*, [1941] A.C. 1. A passage from the judgment of Lord Atkin in the latter case (pp. 27-8) may be here quoted:

“Now to find a basis for the action in any actual contract whether express or to be implied from the conduct of the parties was in many of the instances given obviously impossible. The cheat or the blackmailer does not promise to repay to the person he has wronged the money which he has unlawfully taken: nor does the thief promise to repay the owner of the goods stolen the money which he has gained from selling the goods. Nevertheless, if a man so wronged was to recover the money in the hands of the wrongdoer, and it was obviously just that he should be able to do so, it was necessary to create a fictitious contract: for there was no action possible other than debt or *assumpsit* on the one side and action for damages for tort on the other. The action of *indebitatus assumpsit* for money had and received to the use of the plaintiff in the cases I have enumerated was therefore supported by the imputation by the Court to the defendant of a promise to repay. The fiction was so obvious that in some cases the judge created a fanciful relation between the plaintiff and the defendant. Thus in cases where the defendant had wrongly sold the plaintiff’s goods and received the proceeds it was suggested in some cases, not in all, that the plaintiff chose to treat the wrongdoer as having sold the goods as his agent and so being under an implied contract to his principal to repay But the fiction is too transparent. The alleged contract by the blackmailer and the robber never was made and never could be made. The law, in order to do justice, imputed to the wrongdoer a promise which alone as forms of action then existed could give the injured person a reasonable remedy.”

In a case like this, the owner of money can sue the thief or the blackmailer in tort; or he can sue the person who has received the money in quasi-contract. Since the money did not belong to the person who received it but to somebody else, a promise to repay is imputed to him by law. This fiction creates the privity of contract required by the rules in Atkin’s Court Forms.

It is not necessary to assume that the waiver of the thief’s tort made him the agent of the owner. In fact, as the judgments in the *United Australia* case show,

“waiver” is a misnomer. The owner of the money is not waiving the tort: he is claiming the sum as money had and received on the basis of the tort.

The fact is that the owner has two alternative remedies open to him. He can claim in tort or in quasi-contract. In the present case, for example, the plaintiff could sue the thief for conversion. In the alternative, he could sue the defendant in quasi-contract for money had and received. He adopted the latter course and he was entitled to do this.

In some cases it is not possible to impute a contract. *Sinclair v. Brougham*, [1941] A.C. 398 is an instance of this kind. In that case, a building society had been running a banking business which was not authorised by the statute governing building societies and was, therefore, ultra vires the society. The House of Lords held that the depositors could not recover their deposits as money had and received because an actual contract was rendered impossible by statute.

There is no such impediment in the present case.

It is a pity that in this age we should have to rely on a patently absurd legal fiction which was necessitated by old forms of action. The forms of action disappeared in England a long time ago but the fictions still remain to camouflage reality and to confound the layman. The doctrine of unjust enrichment would provide a straightforward and intelligible remedy in these cases. This doctrine is recognised in the United States and even in Scotland, but as Lord Porter pointed out in *Reading v. Attorney-General*, [1951] A.C. 507 at p. 514 “it forms no part of the law of England”, in spite of the fact that judges in England have not hesitated to use this term and terms synonymous with it such as “ex aequo et bono”, and “higher equity”.

So far as the present case is concerned, I am satisfied that the sum of Shs. 5,000/- has been properly claimed by the plaintiff as money had and received and I give him judgment for this sum with interest and cost.

Judgment for the plaintiff.

For the plaintiff:

R. Hira

For the defendant:

C. S. Joshi

Omari v East African Airways [1970] 1 EA 610 (HCT)

Division:	High Court of Tanzania at Dar es Salaam
Date of judgment:	18 December 1969
Case Number:	21/1969 (128/70)
Before:	Georges CJ
Sourced by:	LawAfrica

[1] Master and Servant – Contract of service – Summary dismissal – Removing jurisdiction from courts – Termination of services with one month's salary in lieu of notice not summary dismissal – Security of Employment Act, 1964 (T.).

[2] Master and Servant – Contract of service – Oral contract – Employer's right to terminate by appropriate payment not abrogated by Security of Employment Act 1964 – Employment Ordinance (Cap. 366), s. 32 (T.).

Editor's Summary

The appellant was employed by the respondent under an oral contract of service. The respondent terminated his services, by payment of one month's salary in lieu of notice, and also gave the reason that the appellant had committed certain offences warranting summary dismissal under the Disciplinary Code.

The appellant argued that the offences should have been established before the Worker's Committee and since that had not been done, the termination of his services was improper since he was protected by the Security of Employment Act.

Held –

- (i) an employer may still terminate an oral contract of service by an appropriate payment to the other party;
- (ii) the appellant had not been summarily dismissed. If he had the jurisdiction of the court, would have been entirely ousted.

Appeal dismissed.

No cases referred to in judgment.

Judgment

Georges CJ: The appellant in this case was employed by East African Airways as a security clerk. On 9 February 1967, the Personnel Officer of the company, Mr. Suleman, sent a letter to him informing him that his services had been terminated by one month's notice effective from the date of the letter. He informed the appellant that he would in fact be given one month's salary instead of notice and that he would also be paid whatever other emoluments to which he would be entitled. Two reasons were stated in the letter for the termination of his services. It was alleged that he had come to work late on 30 January 1967. He had reported at 8.00 a.m. instead of at 5.30 a.m. In addition, he had altered the time-sheets to read 5.30 a.m. instead of 8.00 a.m. It was also alleged that he had disobeyed an order to remain on board a certain aeroplane until he had been relieved. It is quite clear that both these matters would be offences under the Disciplinary Code set out in the Security of Employment Ordinance which, if established, would justify the summary dismissal of the appellant. The company, however, did not choose to dismiss him summarily, but chose instead to terminate his services.

The appellant took the letter to N.U.T.A., his trade union, and consultations took place between N.U.T.A. and the Personnel Department of the respondent company. As a result of these consultations, it seemed to have been established

that the appellant had in fact reported late for work and had in fact altered the time-sheet. It does not appear to have been established that he had failed to stay on the aeroplane until his relief had arrived. On the advice of the N.U.T.A. steward, he wrote a letter to the company asking for forgiveness for having arrived late and having altered the time-sheet.

The appellant here states that he was compelled to write this letter by his N.U.T.A. adviser. He denies that he was late or that he altered the time-book. He asks that the altered time-book be produced in Court. This was not done at the court below. The trial magistrate, however, was satisfied that the appellant had committed the offence, and on the evidence before him, he was justified in so doing. The appellant did not state in the court below that he had been compelled to write the letter. He states here that he was not permitted to say anything in the court below. The record does not indicate this. He gave evidence himself. He called two witnesses, and also cross-examined the witnesses called by the defendant company.

Even if, however, the offence had not been established against the appellant, I am satisfied that he could not succeed in his claim. This was an oral contract of service. Section 32 of the Employment Ordinance (Cap. 366) as amended by the Employment Ordinance (Amendment) Act, 1962, specifically provides that an oral contract of service may be terminated by payment to the other party of appropriate entitlements under the contract. This right does not seem to have been abrogated by the Security of Employment Act (Cap. 374). The Security of Employment Act deals entirely with summary dismissal, not with termination of contract of employment. Before me, the appellant based his claim largely on the Security of Employment Act. He argued that he should have been taken before the Works Committee and that his offence should have been established before them. He stated that since that had not been done, the termination of his services had been improper. All that he says would be quite true if he had been summarily dismissed, but in fact he has not been summarily dismissed. I have explained this matter at great length to him, and I hope that he has understood.

It is also worth pointing out that the jurisdiction of the courts has been entirely ousted under the Security of Employment Act. If the appellant's claim, therefore, was under this Act he would have had no right to audience, except, of course, by way of certiorari or mandamus, in order to challenge the correctness of the procedure followed.

I agree with the interpretation of the Employment Ordinance set out by the trial magistrate in his judgment, and I agree with his conclusion that the appellant's claim cannot succeed. Accordingly, the appeal is dismissed.

Appeal dismissed.

The appellant appeared in person.

For the respondent:

T. J. R. Tarimo (instructed by *Tarimo & Co.*, Dar es Salaam)

Christie v Shah and others
[1970] 1 EA 612 (CAD)

Division: Court of Appeal at Dar es Salaam
Date of judgment: 15 July 1970
Case Number: 31/1970 (130/70)
Before: Spry VP, Law and Lutta JJA
Sourced by: LawAfrica

[1] Land – Sale – Consent – Commissioner for Lands – Required to agreement for sale – Freehold Titles (Conversion) and Government Leases Act (Cap. 253), s. 19 (T).

Editor's Summary

A contract was signed providing for the transfer of certain land to a company to be formed. The Commissioner for Lands gave consent in principle to the proposed disposition. It was agreed that there had been no consent to the disposition and that the Commissioner had no power to give consent to future transactions.

Held – consent is required to an agreement for sale, and this was what the Commissioner gave.

Appeal dismissed.

No cases referred to in judgment.

Judgment

The judgment of the court was delivered by **Spry VP**: This is an appeal from a decision of the High Court on what was described as a preliminary point. In fact it appears to have been a judgment on a preliminary issue and gave rise to a preliminary decree, but nothing turned on this.

The appeal arises out of a suit in which the respondents sued the appellant for damages for breach of a contract of sale of certain land in the Arusha area. A contract had been signed on 9 August 1966, which provided that the eventual transfer was to be to a company to be formed. The appellant paid a deposit on the signing of the agreement and went into possession. The advocates for the respondents sent a copy of the agreement to the Commissioner for Lands with a covering letter, giving further details, and asked for “provisional approval”. The land was held under a Government lease and consent was required under s. 19 of the Freehold Titles (Conversion) and Government Leases Act (Cap. 253). The Commissioner replied saying that “consent in principle is hereby given to the proposed disposition”. He went on to say that the consent was without prejudice to his right to refuse formal consent should all legal and other requirements not be complied with. It is claimed by the respondents that they subsequently called on the appellant to complete the transaction but that he refused.

When the suit came on for hearing, the preliminary point was taken that the agreement was unenforceable for lack of consent. This proposition was rejected by the judge and it is from that decision that this appeal is brought.

Mr Riegels, who appeared for the appellant, argued that the letter from the Commissioner did not give

consent, but only expressed an intention to give consent in the future. He submitted that the language in which the letter is expressed indicates that there was no intention to give consent and that in any case it would not have been competent for the Commissioner to give consent since he did not have all the material facts before him at that time. He went further and submitted that the Commissioner had no power to give consent to a

future transaction. In the alternative, Mr. Riegels submitted that if any consent had been given, it was to the proposed disposition and not to the agreement on which the suit is brought.

With respect, we are not persuaded by these arguments. It is quite clear that, under s. 19 (1) (d) of the Act, consent is required to an agreement for the sale of a Government lease. We think that the letter sending a copy of the agreement of sale to the Commissioner and asking for provisional approval amounted in substance to a request for consent to the agreement. We think that the Commissioner's letter, although perhaps somewhat unhappily expressed in that it referred to the proposed disposition, was in substance a consent to the agreement. It follows that the agreement is not inoperative for lack of consent.

We would add, for the sake of completeness, that if an assignment had been executed, we think consent to that deed would have been necessary and we think this was what the Commissioner intended to convey when he reserved the right to refuse "formal" consent. The use of expressions such as "provisional approval", "consent in principle" and "formal consent" has tended to obscure the issues. We have no doubt that where the Commissioner has given his consent to an agreement, he would rightly consider himself bound to consent to the deed to implement it, unless his consent to the agreement had been induced by any misrepresentation or there had been some radical change in the circumstances and that it is from this that the practice of referring to provisional consent has arisen. We would, however, agree with Mr. Riegels to this extent, that we do not think there can, under the provisions of the Act, be any qualified or conditional consent. We do not, however, agree with his contention that the Commissioner cannot give consent in advance to a disposition. Those questions do not, however, arise on the present appeal, since as we have said, we consider that the Commissioner gave his consent to the agreement for sale. We would stress that consent is given to dispositions, as defined in the Act, and not to transactions.

The appeal is dismissed.

For the appellant:

M. D. Riegels (instructed by *Donaldson & Wood*, Kampala)

For the respondent:

A. Reid (instructed by *Reid & Edmonds*, Moshi)

Kilembe Mines v Akwiri
[1970] 1 EA 614 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	5 August 1970
Case Number:	24/1970 (132/70)
Before:	Duffus P, Spry VP and Mustafa JA
Sourced by:	LawAfrica
Appeal from:	The High Court of Uganda – Sheridan, Ag.C.J.

[1] *Factory – Building operation – Repairing electrical supply to store a building operation – Factories Act (Cap. 198), s. 6 (U.)*.

Editor's Summary

The question for decision in this appeal was whether the respondent when injured was engaged in the repair and maintenance of a building when repairing an electrical fault in an insulator on the outside of the roof of the building. The facts are set out in the judgment of Mustafa, J.A.

Held – (by Duffus, P., and Mustafa, J.A.; Spry, V.-P., dissenting) electric fittings were properly held to be part of the building and the respondent was therefore carrying out repairs to the building.

Appeal dismissed.

Judgment of the High Court (sub nom *Akwiri v. Kilembe Mines Ltd.*) [1970] E. A. 498 upheld.

Cases referred to in judgment:

(1) *Price v. Claudgen Ltd.*, [1967] 1 All E.R. 695.

The following considered judgments were read.

Judgment

Mustafa JA: The respondent was employed by the appellant as an electrician. During 1968 the respondent was instructed to repair an electric fault in a store in the appellant's smelting works at Jinja. The fault was on some wiring on the roof of the store. It seems there was a short circuit in a wire carrying electricity into the store. The wire was held by an insulator fixed to a bracket which apparently was bolted on to a part of the roof. The insulator was on the outside of the roof which sloped from one side.

The insulator was about 18 feet from the ground. The respondent used a 10 foot ladder alleging there was no other ladder available, and climbed on to the flat part of the roof nearest the ground. He walked along the edge of the roof and reached the insulator and repaired the fault. The roof was partly made of corrugated iron sheets and partly of asbestos sheets. On the way back to the ladder while the respondent was walking along the edge of the asbestos part of the roof, a part of the roof gave way and the respondent fell sustaining serious injuries. The respondent was not aware that part of the roof was of asbestos as the roof was all painted an aluminium colour.

The respondent sued the appellant for damages alleging breach of statutory duty and/or negligence. The Chief Justice found the appellant was in breach of statutory duty as well as negligent and awarded the respondent Shs. 50,000/- as general damages. The appellant now appeals.

The main point of the appeal is whether the appellant was in breach of statutory duty. The Chief Justice held that the appellant was in breach of r. 22 (2) of the

Building Operations and Works of Engineering Construction (Safety and Health) Special Rules (hereinafter called “the Rules”) made under ss. 55 (2) and 60 of the Factories Act (Cap. 198). Section 60 of the Act in so far as it is relevant reads:

“60(1) The Minister may make special rules in regard to health, safety and welfare in respect of the classes of premises, operations and works hereinafter described and in respect of any manufacture, machinery, plant, equipment, appliance, material, process, method of storage or description of manual labour used in the said premises, operations and works, that is to say –

- (a) . . .
- (b) building operations undertaken . . . for the purposes of any industrial or commercial undertaking . . .”

Section 6 of the Act defines “building operations” as –

“the construction, structural alteration, repair or maintenance of a building (including re-pointing, re-decoration and external cleaning of the structure) . . .”

Rule 2 (1) of the Rules reads –

“2(1) Subject to the provisions . . . these Rules shall apply to building operations and works of engineering construction where undertaken . . . for the purpose of any industrial or commercial undertaking.”

Now r. 22 (2) of the Rules reads –

“22(2) When workmen work or pass on, over or near any roof covering or ceiling of glass or asbestos cement or of other fragile materials through which a person may fall more than ten feet –

- (a) suitable and sufficient ladders duck ladders or crawling boards which shall be securely supported shall be provided and used; or
- (b) such other effective measures shall be taken as will prevent the fall of persons through any such roof covering or ceiling.”

The short point for decision is whether what the respondent did amounted to a “building operation”. The Chief Justice held it was a work of “repair and maintenance” within the meaning of s. 6 of the Act.

Counsel for the appellant has submitted that the work of the respondent could not amount to a “building operation”, nor was it repair and maintenance of a building within s. 6 of the Act since the wire, insulator and bracket were not part of the store but only attached to it and their removal would leave the store unaffected. He concedes that internal lights and presumably internal wires may be part of a building but that outside lights cannot be part of a building. He relied on *Price v. Claudgen Ltd.*, [1967] 1 All E.R. 695. In that case an electrician while working on the roof of a cinema in order to join electric wires to a neon light installation which was affixed by clamps attached to pins driven into the masonry, fell off the building when a switch was suddenly switched on and was injured. It was held that the electrician was not entitled to recover damages against his employers for breach of duty under the Building (Safety, Health and Welfare) Regulations, 1948, (which are similar to the “Rules”) on the ground that the work carried out by the electrician was not repair or maintenance of the building within those Regulations since the neon installation was not part of the building.

Although no direct evidence has been adduced, I think it is safe to assume that

the wire, insulator and bracket were affixed to the store at its construction, and the purpose was to carry electric light into the store to enable it to be used effectively. A building is not necessarily the empty shell and walls only but may include fixtures necessary to its being used and enjoyed effectively. Not all fixtures are parts of a building, but some must be. There can be no general rule or guiding principle as to what constitutes or does not constitute part of a building. That will depend on the particular facts of each case. To determine this a number of factors may have to be taken into consideration, for instance, the type of building, what it is used for, the nature of the fixture, how essential it is to the proper and effective enjoyment of the building, the degree and manner of annexation or installation and so on.

The Chief Justice held that the repair work carried out by the respondent was “a work of repair and maintenance to the store and so come under the Rules”. In coming to that conclusion the Chief Justice purported to distinguish this case from *Price’s* case on the ground that in *Price’s* case the neon installation had a switch separate from the cinema, and was separately owned, and that the worker there was to a large extent himself negligent. With respect I do not think those distinctions are particularly relevant. The fact remains, however, that the Chief Justice came to the conclusion that the work carried out by the respondent was “a work repair and maintenance to the store”. I cannot say that the conclusion is wrong or unreasonable on the facts of this case. Indeed I myself would think that electric wiring and installation for lighting in this time and age would be an essential and integral part of a building. As was stated by Lord Morris of Borth-y-Gest in *Price’s* case (p. 698) –

“... Nor is it profitable to seek to formulate or to express any guiding tests as to what could be or could not be a part of a building. Decision here rests on the particular established facts. I agree with the Lord President that there may be many things which could be attached to or hung on to or placed onto or in a building, which in no true sense would be or become a part of the building. There could be cases in which something was so fixed or installed or erected on or in a building as reasonably and properly to be regarded as a part of the building. For a determination of the present case I cannot think that a study of any authorities assists.”

With respect I would accept that as a valid statement.

Here the wire was held by an insulator affixed to a bracket which was bolted to the roof of the store, the store being part of a complex in the smelting works of the appellant, the installation was to allow electric light to be carried into the store for it to be properly and effectively used and this installation was most probably installed at the time the store was constructed as part of the building operations. In my view there was evidence for the Chief Justice to have held that the installation had been made a part of the store. Again quoting from *Price’s* case “In one sense the case may be one of first impression”. As I have said my impression accords with that of the Chief Justice. I would uphold the finding of the Chief Justice that the installation was part of the store and that the appellant was in breach of statutory duty in terms of r. 22 (2) of the Rules.

The Chief Justice also found that the appellant was negligent in failing to give any or any sufficient warning to the respondent about the danger of going on the roof and of failing to take effective measures to prevent the respondent from falling. There is sufficient evidence in the record for such a finding. I am of opinion the Chief Justice was right in awarding the respondent general damages for the injuries he sustained.

I would dismiss the appeal with costs.

Spry VP: This is an appeal from a judgment and decree of the High Court awarding the respondent Shs. 50,000/- as damages for injuries suffered as the result of a breach by the appellant company of a statutory duty.

The appellant is an electrician employed by the appellant company. He was so employed in November 1968, when he was instructed to repair a lighting failure in a store belonging to the appellant company. The failure was due to a short circuit in a wire which carried electricity into the store. The short circuit occurred at the point when the wire was held by an insulator fixed to a bracket, which was bolted onto a wooden beam at the pitch of the roof of the store. The insulator and the bracket were on the outside of the store.

The respondent, who alleged that there was no adequate ladder available for direct access, climbed onto the roof of the store at the end where the roof was nearest the ground, climbed to the pitch of the roof and repaired the wire. On his way back, he fell through the roof and sustained injuries. He claimed damages primarily for breach of statutory duty or in the alternative for breach of contract or for negligence.

The basis of the judgment is a finding that the appellant company had been guilty of a breach of the statutory duty created by r. 22 (2) of the Building Operations and Works of Engineering Construction (Safety and Health) Special Rules (S. 1. 198 No. 17) (to which I shall refer as the Rules). These rules were expressed to be made under ss. 55 (2) and 60 of the Factories Act (Cap. 198). Section 55 (2) does not appear relevant to the present proceedings. Section 60, so far as it is relevant, reads as follows –

“60(1) The Minister may make special rules in regard to health, safety and welfare in respect of the . . . operations . . . hereinafter described and in respect of any manufacture, machinery, plant, equipment, appliance, material, process, method of storage or description of manual labour used in the said . . . operations . . . , that is to say –

(b) building operations undertaken . . . for the purpose of any industrial or commercial undertaking . . .”

“Building operations” is defined in s. 6 of the Act as –

“the construction, structural alteration, repair or maintenance of a building (including re-pointing, re-decoration and external cleaning of the structure) . . .”

It is against that background that the Rules must be examined. As I have said, the rule on which the Chief Justice held the appellant company to be liable was r. 22 (2). This reads as follows –

“(2) When workmen work or pass on, over or near any roof covering or ceiling of glass or asbestos cement or of other fragile materials through which a person may fall more than ten feet –

(a) suitable and sufficient ladders, duck ladders or crawling boards which shall be securely supported shall be provided and used; or

(b) such other effective measures shall be taken as will prevent the fall of persons through any such roof covering or ceiling.”

By r. 2 (1) of the Rules, they are expressed to apply to

“building operations . . . when undertaken . . . for the purpose of any industrial or commercial undertaking”

following the wording of s. 60 of the Act. By r. 4 it is made the duty of every employer of workmen who is undertaking any operation to which the Rules apply to comply with them.

The first question is, then, whether the task which the respondent was given amounts to a building operation. Clearly it can only do so if it falls within the words “repair or maintenance of a building” in the definition of “building operations”. These words must be read in their context: they are preceded by the words “construction, structural alteration” and followed by the words in parenthesis” (including re-pointing, re-decoration and external cleaning of the structure)”. All these words refer to the structure of a building. There is nothing in s. 60 of the Act, interpreted in accordance with s. 6, to suggest that the rule-making power was intended to apply to the installation, repair or removal of fixtures and fittings, nor is there any reference to fixtures and fittings in the Rules themselves.

Mr. Dalal, for the respondent, argued that there can be no general rule as to when a fixture is to be regarded as part of a building; it must depend on the particular facts of each case. With that, I agree. As regards the present case, he argued that the store could not be used without light; therefore the electrical fittings were an essential part of the store; therefore repairs to the electrical fittings amount to repair of the store. I am not persuaded by this argument. If lighting was essential to the use of the store (and there is no evidence that it was), it might have been provided by lamps in no way affixed to the structure and then it could not possibly have been argued that their indispensability made them a part of the building. I am not saying that the fact that a fixture may be essential to the enjoyment of a building may not be a factor to be considered in deciding whether that fixture is to be regarded as part of the building, but in my opinion it cannot be a decisive one.

Mr. Keeble, for the appellant company, submitted that in considering this question, no regard should be had to the real property rules relating to fixtures as between landlord and tenant or vendor and purchaser. I agree in principle, although I think the factors to be considered are probably similar.

I think the purpose for which a fixture is attached to a building is a relevant factor, but again not a decisive one. For what it is worth, this factor supports the respondent’s case: I see no reason to doubt that when the electric wire was carried to the store, it was intended to be permanent and that it was fitted solely to enable the store to be used to greater advantage.

I think, however, that the most important factor is the degree of annexation, that is to say the extent to which the fixture has become a part of the structure of the building. This is sometimes expressed in a different way, using as the test the damage which the removal of the fixture would do to the structure. I am prepared to accept that electric wires are capable of being part of the structure of a building, as, for example, when they are sunk in the walls and plastered over. Here, however, all that the record shows is that the wire was held outside the building by an insulator on a bracket. We do not know how or indeed if the wire was attached to the inside of the store. I have no doubt that the wire could have been detached from the insulator with very little trouble and without causing any damage to the main structure, and it appears to have been the wire which the respondent was instructed to mend. Even if the repairs involved the insulator or the bracket which held it, and this does not appear from the record, the bracket appears only to have been bolted to a wooden beam and could easily have been removed without damage either to the bracket itself or to the building. Having regard to these considerations, I find it impossible to say that repairing the wire constituted a reparation of the building.

I base this decision entirely on the wording of the Act but I find support for it in the English case of *Price v. Claudgen Ltd.*, [1967] 1 All E.R. 695, a decision of the House of Lords, on which Mr. Keeble relied strongly both in the High

Court and before us. The Chief Justice considered this case fully and remarking that on the face of it the facts were similar, said –

“I would distinguish the present case where the insulator feeds the light to the store. It is a fixture on the building and so is part of it. In *Price’s* case the neon installation had a switch separate from the cinema. It was separately owned. The appellant ignored standing instructions and took a chance that the current would not be switched on. There was a high degree of contributory negligence.”

With great respect, I am unable to agree. I cannot see that it makes any difference that in the one case electric current was passing from the inside of the building to a light outside, and in the other passing from the outside to a light inside. I cannot see, on the admittedly somewhat inadequate information before us, that the fittings were any more a fixture in one case than in the other. The fact that the neon lighting in *Price’s* case had a separate switch does not seem to me of any significance: it was part of the general switchboard in the cinema, although controlled by its own key. It was, with respect, a misdirection to say that in *Price’s* case the installation was separately owned: the question of ownership was not, in fact, decided. Finally although in that case there was a high degree of contributory negligence that is irrelevant in deciding whether or not the Rules apply.

I would allow the appeal.

Duffus P: The facts in this appeal have been fully set out by Spry, V.-P., and Mustafa, J.A. whose judgments I have had the advantage of reading in draft form.

I agree that it may be difficult to decide what is a fixture forming part of a building, the maintenance and repair of which would amount to a building operation within the meaning of the Factories Act (Cap. 198) and the Building Operations and Works of Engineering Construction (Safety and Health) Special Rules. I also agree with the Vice-President that the real property rules as between a vendor and a purchaser or between a landlord and a tenant do not apply here but the principles evolved dealing with this matter are helpful and certainly some of the same rules do apply here. Thus the question of whether the fitting is permanent or temporary is important and certainly one test would be whether the object and purpose of the fitting was for the permanent and substantial improvement of the building. It is, of course, most necessary to consider the method of the attachment of the fitting to the building.

This is really a question of fact. The facts here are that the respondent, who was employed as an electrician by the appellants, was sent to a store to repair some fault in the electricity supply of that building. Electricity was used in the building and I think that one must assume that electric lights were permanently fitted and used in the building and that these lights were necessary for the use and enjoyment of the store. It is also a fact that the wire came into the building through a fixture at the top of the roof; an insulator which was attached permanently to the roof by bolts and the wire must have entered into the building through or under the roof. There is, I agree, very little evidence showing the manner in which the electrical wires and fittings were attached but I think it must be assumed that these were all permanent and necessary fixtures. There was no suggestion of their being temporary. If this is the case, then it would appear to me that the trial judge was justified in finding that these electrical fittings were, in fact, permanent and necessary fittings and as such form part of the building. On these facts it does appear to me that the respondent was at the time of the accident carrying out repairs to the building and that he would come within the

protection afforded by the Factories Act and Regulations and that the judge was correct in finding that the appellants had been guilty of a breach of its statutory duty.

I agree, therefore, that the decision of the trial judge was, on the facts set out, justified and I would dismiss this appeal with costs, and as Mustafa, J.A., also agrees it is so ordered.

Appeal dismissed.

For the appellant:

O. J. Keeble (instructed by *Hunter & Greig*, Kampala)

For the respondent:

S. H. Dalal (instructed by *Dalal & Singh*, Kampala)

Haining v Republic
[1970] 1 EA 620 (CAD)

Division:	Court of Appeal at Dar es Salaam
Date of judgment:	15 July 1970
Case Number:	66/1970 (133/70)
Before:	Spry VP, Law and Lutta JJ A
Sourced by:	LawAfrica
Appeal From:	The High Court of Tanzania – Georges, C.J.

[1] *Criminal Law – Corruption – By public servant – Money paid to accused as loan – Whether “consideration” includes loan – Whether promise to repay loan without interest adequate consideration – Meaning of “inadequate” – Prevention of Corruption Ordinance (Cap. 400), s. 6 (T.).*

[2] *Evidence – Burden of proof – Corruption – Accused to prove advantage not accepted corruptly – Prevention of Corruption Ordinance (Cap. 400), ss. 3 (1) and 8 (T.).*

[3] *Criminal Practice and Procedure – Sentence – Minimum Sentence – Applies to any party to corrupt transaction – Minimum Sentences Act (Cap. 526), Schedule, item 7, (T.).*

[4] *Criminal Practice and Procedure – Sentence – Minimum Sentence – Not applicable to offence of accepting advantage for inadequate consideration – Minimum Sentences Act (Cap. 526), Schedule, item 7, (T.).*

[5] *Evidence – Additional – Witness not called at preliminary enquiry – Reasonable notice required.*

Editor’s Summary

The appellant was convicted of corruption. The High Court found that while he was Regional Engineer of Mwanza, and a public servant, the appellant had corruptly accepted as a gift a Mercedes Benz car from one Ahmed, the director of a company which held contracts with the Government, as a reward for showing favours to the company in the affairs of the Government; and had similarly accepted an interest-free loan from one Soutis. The appellant was sentenced to three years imprisonment. On appeal the appellant contended that it had not been shown that the car was a gift, that Ahmed had not been shown to be a person holding or seeking a contract from a public body; that the loan was not for an inadequate consideration and that there was no minimum sentence for the offences.

Held –

- (i) inadequate consideration means less than the market value of the thing accepted, and consideration includes loan;
- (ii) a promise to repay a loan without interest is not an adequate consideration;
- (iii) the accused must prove on a balance of probabilities that he did not accept the advantage corruptly as an inducement or reward;

- (iv) taking part in a corrupt transaction with an agent in item 7 of the Schedule to the Minimum Sentences Act (Cap. 526) applies to any party to such a transaction;
- (v) the Minimum Sentences Act does not apply to offences under s. 6 of the Prevention of Corruption Ordinance (Cap. 400) consisting of accepting advantages for inadequate consideration.

Observations: On reasonable notice of the calling of witnesses who had not given evidence at the preliminary inquiry.

Appeal dismissed.

Cases referred to in judgment:

- (1) *Public Prosecutor v. Yuvaraj*, [1970] 2 W.L.R. 226.

Judgment

The considered judgment of the court was read by **Law JA:** The appellant was tried in the High Court of Tanzania at Mwanza on an information containing 7 counts for offences against the Prevention of Corruption Ordinance (Cap. 400). He was acquitted on 2 counts, convicted on 3 counts, and no verdict was returned on 2 counts which were by way of alternative counts. Counts 3 and 5 relate to a motor car which came into the appellant's possession through the agency of one Zahir Ahmed, and count 7 relates to a loan allegedly made to the appellant by one John Soutis.

As regards the motor car, it is not now in dispute that it was bought in Dar es Salaam by Zahir Ahmed or another member of his firm in the appellant's name; that it was registered in the appellant's name and delivered to him in Mwanza. The appellant's case is that the money used in buying the car was a loan from Zahir Ahmed, which loan was to be repaid within a year with interest; the Republic's case was that the car was a gift. We do not propose to deal in detail with the grounds of appeal directed against the Chief Justice's finding that the car was a gift. There was material from which that inference could properly be drawn and we are not persuaded that it was wrong. It is not in dispute that the appellant was at all material times a public servant, and that he knew Zahir Ahmed to have been a director of the firm concerned in a matter or transaction with himself as a public servant. As a gift is a transfer of property for no consideration, it follows that the appellant accepted the car without consideration, and we can see no merit in the appeal against conviction on count 5 which is hereby dismissed. Even had the transaction been found to be a loan, it would not have affected the conviction, since the definition of "consideration" includes a loan and we are satisfied, for reasons which appear later in this judgment, that the alleged consideration would have had to be regarded as inadequate.

Whether the conviction on count 3 for corruptly accepting the car as a reward, contrary to s. 3 (1) of the Prevention of Corruption Ordinance (Cap. 400) (hereinafter referred to as the Ordinance) can be sustained raises questions of some difficulty which require careful consideration of ss. 3 (1) and 8 of the Ordinance.

Section 3 (1) reads as follows –

"Any person who by himself, or by or in conjunction with any other person, corruptly solicits, accepts or obtains, or agrees to accept or attempts to obtain, from any person for himself or for any other person, any consideration as an inducement to, or reward for, or otherwise on account of, any agent (whether such agent is

the same person as such first mentioned

person or not) doing, or forbearing to do, or having done or forborne to do, anything in relation to his principals' affairs or business, shall be guilty of an offence."

If this section stood alone, it would be for the prosecution to prove, beyond all reasonable doubt, that when the appellant accepted as a gift the car from Zahir Ahmed, he did so corruptly, as a reward for having done or foreborne to do something in his capacity as Regional Engineer in relation to the affairs of his principal. But s. 3 (1) does not stand alone. In the case of public servants, it has to be read together with s. 8 of the Ordinance which deals with the proof of proceedings under s. 3. Section 8 reads as follows –

"Where, in any proceedings under s. 3, it is proved that any consideration has been offered, promised or given to, or solicited, accepted or obtained or agreed to be accepted or obtained by, an agent of the government or of a public body by or from a person, or agent of a person, holding or seeking to obtain a contract from the government or from any public body, the consideration shall be deemed to have been offered, promised or given and solicited, accepted or obtained or agreed to be accepted or obtained corruptly as such inducement or reward as is mentioned in s. 3 unless the contrary is proved."

Before proceeding to consider the extent to which s. 8 transfers the burden of proof to the accused, it is necessary first to consider the submission made by Mr. Blom-Cooper, who appeared for the appellant in this appeal, that s. 8 did not apply at all, as it had not been proved that Zahir Ahmed was a person, or agent of a person, holding or seeking to obtain a contract from a public body. As to this, it was proved that Zahir Ahmed's firm was on the list of official contractors to the Ministry in Mwanza Region, that many contracts were awarded to that firm, and the appellant himself agreed that "between June and August 1969" one contract was held by that firm. The material date charged in count 3 is "in or about the month of June 1969" and we are quite satisfied that Zahir Ahmed was, in June 1969, a person or agent of a person holding or seeking to obtain a contract from the Ministry, so that s. 8 applies to the case under consideration. The Chief Justice directed the assessors that it was for the prosecution to prove that the gift was received as an inducement or reward, and that the onus which would then shift to the appellant would then be on a balance of probabilities that he was not corrupt. By the time the Chief Justice came to write his judgment he had reconsidered this direction, and the direction which he gave himself was that the word "deemed" in s. 8 governs not only the word "corruptly" but also the phrase "such inducement or reward . . ." which follows. As the Chief Justice said –

"I am satisfied . . . that the Republic has merely to prove the gift and that thereupon the burden shifts to the accused to show on the balance of probabilities that it was not corruptly received and that it was not received as an inducement or reward for doing or forbearing to do or having forborne to do some act in relation to his principal's affairs. It is on this basis that I shall approach and evaluate the evidence in this case."

Mr. Blom-Cooper has strongly attacked this direction as one which places on the appellant a much heavier burden than the legislature intended. There is no direct authority on the point, but Mr. Blom-Cooper relies on a passage in the judgment of the Board in *Public Prosecutor v. Yuvaraj*, [1970] 2 W.L.R. 226 which may be taken as meaning that the only burden placed on the accused in a charge involving corruption is to show on a balance of probabilities that he was not acting corruptly. But in the same judgment, at p. 233, appears the following with reference to the corresponding section to s. 8 in the Tanganyika Ordinance –

“The section is designed to compel every public servant so to order his affairs that he does not accept a gift in cash or kind from a member of the public except in circumstances in which he will be able to show clearly that he had legitimate reasons for doing so.”

This statement, with which we agree, supports the view taken by the Chief Justice. The elements of a charge contrary to s. 3 (1) of the Ordinance are that the accused person –

- (a) corruptly
- (b) accepts a consideration
- (c) as an inducement or reward for doing or not doing something in relation to his principal’s affairs.

When that accused person is a public officer, as in this case, then s. 8 provides that when it is proved that the consideration has been accepted (in this case the car) by such public officer, and that the person from whom the consideration is accepted is a contractor holding or seeking a contract from the Government, then the consideration shall be deemed to have been accepted “corruptly as such inducement or reward as is mentioned in s. 3 unless the contrary is proved”. The section does not say that where it is proved that any consideration has been accepted by an agent of the Government as an inducement or reward, the consideration shall be deemed to have been accepted corruptly unless the contrary is proved. The deeming applies both to the consideration having been accepted corruptly, and as an inducement or reward, and the burden of proving the contrary in both these respects, on a balance of probabilities, lies on the accused person. We are accordingly satisfied that the Chief Justice correctly directed himself on this point, and that it was for the appellant to satisfy the court on a balance of probabilities that he did not accept the car from Zahir Ahmed corruptly as an inducement or reward. On a consideration of the case against the appellant as charged in count 3, in the light of the direction which he had given himself as to the onus of proof, the Chief Justice found it proved beyond all reasonable doubt, after very careful examination of all relevant evidence and circumstances, that the car was a gift, and that the appellant had not discharged the onus of showing that the gift was not corruptly received as an inducement or reward. In our opinion this was a correct conclusion and we dismiss the appeal against conviction on count 3.

Before leaving this part of the appeal, there is one other matter with which we should deal.

On a preliminary objection that reasonable notice had not been given of intention to call four witnesses whose statements had not been produced at the preliminary inquiry, the Chief Justice, after remarking that the substance of the evidence which these witnesses would give would not take the defence by surprise, went on to say –

“My duty is to decide what notice is reasonable. Where the evidence is of importance, I would be inclined to hold that there should be an adjournment to enable reasonable notice to be given rather than an outright rejection of the evidence, despite its relevance and importance . . . Mr. Georgiadis has made it clear that he is not asking for an adjournment . . . Taking into account the fact that no adjournment has been sought, I would hold the notice is reasonable.”

This ruling was vigorously attacked by Mr. Blom-Cooper. It appears to us that it is unnecessary for us to consider whether in the present case the four witnesses ought to have been called, in view of our decision on s. 8 of the Ordinance, but we think we ought to express our opinion on the question of law.

It is quite clear that the intention behind s. 273 of the Criminal Procedure Code is (a) that all evidence known to the prosecution at the time of the preliminary inquiry and which it is intended to call shall be disclosed at the preliminary inquiry; (b) that where it is later decided that some evidence which it was not intended to call, ought to be called, that evidence shall be disclosed as soon as possible after the decision to call it and (c) that where relevant evidence is discovered after the preliminary inquiry, it shall be disclosed as soon as possible after its discovery.

Where notice of intention to call additional evidence has been served, and the defence contend that the notice was not given within reasonable time, the trial court has to decide whether the notice was reasonable. In reaching that decision, the court must take into account the factors mentioned in sub-s. (3) of s. 273 and may, we think, take into account any other relevant factors. In particular, we think the court may, and indeed must, consider the nature of the evidence and in particular its importance, its complexity, the likelihood of surprise and the possibility that evidence in rebuttal which might have been available earlier may no longer be available. Notice which would be quite reasonable for some simple, perhaps formal, evidence may be wholly inadequate for evidence of a complex and highly incriminatory nature.

This is not a matter where a remedy is lightly to be found in adjournment and we think, with respect, that the Chief Justice was wrong in expecting the application for adjournment to come from the defence. If the notice was unreasonable, it is the prosecution that requires such an adjournment that when the witness is called, the notice that was given is not unreasonable. The application for adjournment will follow the decision that the notice was unreasonable: it is not a factor to be considered in deciding on the reasonableness of the notice. The grounds for granting an adjournment are set out in s. 268 of the Code and we do not think a court will, save in exceptional circumstances, be satisfied that reasonable cause exists, when the failure to give proper notice was due to negligence or worse.

We turn now to count 7. The facts, briefly, are that the appellant asked for and received a loan of Shs. 15,000/- free of interest and without security from one John Soutis, another contractor with whom the appellant had dealings in the course of his duties. The appellant and Soutis had been acquaintances but not friends. The only question on this count was whether the appellant knew the consideration for the loan to be inadequate. Mr. Blom-Cooper argued that the undertaking by the appellant to repay the loan in full was adequate consideration. We are, with respect, unable to agree.

It seems to us, reading s. 6 as a whole, that when it refers to accepting any valuable thing for a lawful consideration which the recipient knows to be inadequate, "inadequate" must mean less than the value of the thing accepted, and value will ordinarily mean the price which a willing purchaser would pay to a willing vendor. In the case of a loan, the "adequate" consideration will be not merely the promise to repay, but also the promise to pay interest at at least the lowest rate of which the borrower could have borrowed elsewhere, taking into account, of course, any security he could offer, his general creditworthiness, current rates of interest and any other relevant factors. Any other interpretation would mean that the recipient was receiving the equivalent of a gift, in the difference in price or in the rate of interest, and that is just what the section is intended to prevent. For these reasons, we think the appeal fails also against conviction on count 7, which relates to the loan made to the appellant by Soutis, who at the time he made the loan held a contract with the Ministry. This loan was made without provision for interest and was accordingly, in our view, for a consideration which, although lawful, was inadequate and which the appellant must have known to be inadequate.

Finally, we turn to the question of sentence. The Chief Justice expressly applied the Minimum Sentences Act in respect of counts 3 and 5 and, by implication, we think, also in respect of count 7.

Mr. Blom-Cooper submitted that item 7 of the Schedule to the Minimum Sentences Act does not include all offences under ss. 3 and 6 of the Ordinance. That item reads as follows –

“Taking part in a corrupt transaction with an agent contrary to s. 3 of the Prevention of Corruption Ordinance (Cap. 400) or obtaining an advantage without consideration contrary to s. 6 of that Ordinance.”

He argued that the words “corrupt transaction with an agent” apply only to a person who enters into a transaction with an agent and not to the agent himself and that the specific reference to receiving an advantage “without lawful consideration” is exclusive and therefore that Act does not apply to the receiving of an advantage for an inadequate consideration.

We are not persuaded by the first of these arguments. We think that the words “entering into a corrupt transaction with an agent” are ambiguous and therefore it is proper to look to the intention of the legislature. Offences under s. 3 of the Ordinance are more serious than those under s. 6. Certain offences under s. 6 committed by agents are unquestionably included in item 7: we regard it as unthinkable that the legislature should have included those offences and yet excluded all offences by agents under s. 3. Therefore we think the ambiguity in item 7 must be resolved by holding that the words “corrupt transaction with an agent” are to be read as one and that any party to such a transaction is caught by the item.

As regards s. 6, we think there is no ambiguity and therefore that the clause must be read literally. Mr. King argued that the draftsman has merely used the words of marginal note and therefore that all offences under s. 6 are covered. We do not agree for two reasons. First, the Act is a penal statute of great severity and should therefore be interpreted strictly. Secondly, in other items, notably item 2, the wording of the marginal note has not been followed. It cannot therefore safely be assumed that there was any intention to include any offences other than those specifically mentioned. Moreover, while the question was probably not thought of, it is at least possible that the legislature thought that as questions of inadequacy are entirely matters of degree, offences that depend on those questions are not appropriate for minimum sentences. We would therefore hold that the Minimum Sentences Act does not apply to those offences under s. 6 which consist of the receipt of advantages for an inadequate consideration but only to those where there is no lawful consideration.

It follows from the above that in our opinion the conviction on count 5, where there was no lawful consideration, was one coming within the scope of the Minimum Sentences Act but that the conviction on count 7, which alleged obtaining a loan for a consideration which the appellant knew to be inadequate, was not one coming within the scope of that Act.

Appeal dismissed.

For the appellant:

L. J. Blom-Cooper Q.C. (of the English bar), *M. D. Riegels* and *F. H. Uzanda* (instructed by *Donaldson & Wood*, Dar-es-Salaam)

For the respondent:

N. King (Senior State Attorney) and *M. Chandoo* (State Attorney)

B v B
[1970] 1 EA 626 (HCK)

Division: High Court of Kenya at Nairobi
Date of judgment: 5 June 1970
Case Number: 65/1969 (134/70)
Before: Harris J
Sourced by: LawAfrica

[1] Costs – Security for costs – divorce – Whether wife without property entitled to security.

Editor's Summary

Husband and wife continued to live under the same roof after the wife had filed a divorce petition on the grounds of cruelty. The wife applied for an order for security for her costs of the proceedings. The wife had no property or income and the husband's income was committed to maintaining the family. He owned a motor car and a life insurance policy. The registrar refused to make an order for security and the wife appealed.

Held –

- (i) The registrar has a discretion to make an order for security unless it is shown that the wife has sufficient separate estate or that there is good cause in the nature of a legal bar or disability;
- (ii) it had not been shown that the life insurance policy had no value and the wife was entitled to have resort to the family purse for the purpose of providing security for costs.

Appeal allowed.

Cases referred to in judgment:

- (1) *Allen v. Allen*, [1894] P. 134.
- (2) *Williams v. Williams*, [1929] P. 114.
- (3) *Peters v. Peters*, [1950] P. 28.
- (4) *Luff v. Luff*, [1950] P. 61.

Judgment

Harris J: This is an appeal by the petitioner from a refusal by the deputy registrar to direct that the respondent, as the petitioner's husband, do secure her costs of the proceedings. The costs in question have been drawn and a bill filed pursuant to r. 70 (2) of the Matrimonial Causes Rules but no specific sum has been ascertained by the taxing officer as being sufficient to cover the petitioner's costs as

contemplated by r. 70 (3).

The suit is one in which the petitioner seeks a decree of divorce on the ground of cruelty and an order granting her custody of the only child of the marriage, together with alimony pendente lite and maintenance for herself and the child. The respondent in his answer denies the cruelty alleged and prays to have the petition dismissed. Each party seeks costs against the other.

The facts material to this application are not the subject of serious dispute. In an affidavit filed by him pursuant to r. 44 of the Rules the respondent says that his property consists of a motor car valued at Shs. 5,000/- and a life insurance policy in the sum of Shs. 50,000/-; that his monthly income after all deductions including house rent comes to Shs. 2,400/-; and that his monthly expenses (which include those incurred in respect of the petitioner and the child of the marriage, each of whom is residing with him in the matrimonial home) are

Shs. 1,950/-. This sum is stated to comprise inter alia an insurance premium of Shs. 220/- and “provision for the maintenance of the family car (insurance premium and road tax)” amounting to Shs. 200/-.

The petitioner has not challenged these figures and it is conceded by the respondent that she has no property or income of her own save that she has deposited a sum of Shs. 300/- with her advocates in respect of the costs and disbursements to be incurred in this suit.

At the hearing before the deputy registrar counsel for the respondent contended that security should not be ordered because, among other reasons, the respondent’s only movable property consisted of the motor car. The deputy registrar, in giving the reason for his dismissal of the application, said:

“Having considered the argument addressed to me by counsel on both sides and the affidavit of means filed by the husband and the fact that the wife, the husband and the child of marriage are still living in the same matrimonial home and the husband is practically left with little or no income at all, on the authorities cited before me I came to the view that, although the wife had no income of her own nor any other property, this was a case in which the husband had shown good cause under r. 70 (3) why an order for security for the wife’s costs should not be made, and in the result the wife’s application for security for costs was refused.”

Counsel for the petitioner in support of the appeal submitted that from the terms of his order it was clear that the deputy registrar had completely omitted to take into account the realizable value of the respondent’s insurance policy and that this constituted a failure to exercise his discretion judicially. He further contended that, although the respondent has been able to show on paper that his net income of £2,400 per annum is more or less fully committed to the maintenance of the household in which the petitioner is participating, this income, instead of being regarded as exclusively his, should be treated as a joint income inasmuch as it is earned by him as a member of the family whose home is run by the petitioner. Counsel also referred to the fact that the respondent had retained the services of an advocate for the purpose of resisting the petition and he submitted that in the circumstances the petitioner’s costs constituted “necessaries” for which the respondent, as her husband, is liable. In support of these propositions he referred to *Allen v. Allen*, [1894] P. 134; *Williams v. Williams*, [1929] P. 114; and *Luff v. Luff*, [1950] P. 61.

Counsel for the respondent also relied on *Williams’* case, and contended first that, being an appeal from a discretionary order, this court should not interfere unless satisfied that that order was made as a result of an omission by the deputy registrar of an essential consideration and, secondly, while conceding that the petitioner had not sufficient separate estate within the meaning of r. 70 (3), submitted that the respondent had shown “other good cause” within that rule to justify the refusal by the deputy registrar of the relief sought. In support of this contention I understood him to say that the insurance policy, not having yet matured, could be realized at this date only at a loss and that the respondent cannot be compelled, in order to avoid realizing it, to raise a loan by offering it as security since that would constitute his running into debt. In addition he invited the court to consider the terms of the petition filed in the matter and to say that it was almost frivolous, a consideration which, he said, should be taken into account in determining whether the respondent has sufficiently shown “other good cause” against the granting of the application.

In view of the fact that none of the decisions cited is of a court in this country and that I have not myself succeeded in finding any Kenya decision in point, I will first consider the matter from the practical viewpoint without reference

to the authorities. The provisions of r. 70 (3) are that the registrar or taxing officer to whom the wife's bill of costs shall have been referred –

“shall ascertain what is a sufficient sum of money to cover the costs of the wife of and incidental to the hearing of the cause, and may, unless the husband proves that the wife has sufficient separate estate or shows other good cause, order the husband to pay to the wife or into court her costs up to the setting down of the cause and to pay into court or secure the costs of and incidental to the hearing within such time as he may fix, and may direct a stay of the proceedings until the order is complied with.”

The fair construction of this subrule is, in my opinion, that it confers a discretionary power upon the registrar to order security in all cases save only where the husband undertakes and discharges the onus of either proving that the wife has sufficient separate estate or showing other good cause against the making of such an order. In the present case it is agreed that the petitioner does not possess sufficient separate estate and the first question therefore is as to whether it can be said that the respondent has shown “good cause” and therefore precluded the discretionary power contemplated by the subrule from arising. In my view, since this is an issue dehors the question of discretion, it would seem to contemplate something in the nature of a legal bar or disability. None has been shown to exist here and I can therefore pass on to the second question, namely, as to whether that discretion was judicially exercised. I shall assume, but without so deciding, that since this hearing is in strictness an appeal under r. 57 of the Rules the burden of proof rests upon the petitioner as appellant.

From the contents of the respondent's affidavit it would appear that, since the insurance of what is described as the family car is covered by another item in the list, the monthly insurance premium of Shs. 220/- must be that payable in respect of the life policy. The Court is not told when this policy was taken out or whether it is a “whole life policy” payable only at death or a life endowment policy payable either at the expiration of a fixed period or at death whichever first shall happen, but whatever it may be it is difficult to see why a policy for Shs. 50,000/- carrying an annual premium of Shs. 2,640/- should not have a present surrender value. The deputy registrar, however, appears to have accepted the propositions that the only movable property of which the respondent is possessed is the motor vehicle and therefore that if security were ordered it would have to come out of income. In my opinion the respondent cannot be said to have established these propositions for he has not displaced the probability that the insurance policy has a surrender value at least as great as the figure to which the petitioner's bill of costs had been drawn, representing less than the aggregate of three years premiums, nor is it apparent why security, if ordered, could not be given by a bond secured on the value of the policy instead of out of income, thereby avoiding any necessity for either surrendering the policy or selling any other asset.

As to the respondent's contention that the grounds shown by the petitioner in her petition for seeking a dissolution of the marriage are “almost frivolous” I will say nothing more than that the petition appears to contain allegations and particulars sufficient *prima facie* to comply with the Act and the Rules, although it may well be that a re-consideration by the parties of the financial implications of a dissolution might enable them to resolve their difficulties in some other way.

For these reasons and accepting, as I do, that the order of the deputy registrar falls within the rule that, being a discretionary order, it should not be interfered with unless in making it the deputy registrar proceeded on a wrong principle or overlooked some material factor which he should have taken into account,

I am satisfied that the petitioner is entitled to ask the court to reconsider the application unfettered by the decision of the deputy registrar.

The next question is whether on the facts before me it would be proper to grant to the petitioner the security which she seeks. There is much to be said on each side and this has been ably put forward by counsel. The circumstances here are typical of those prevailing in many small families consisting of a husband, a wife, and a young child, all living together and being supported financially out of the income of one or both of the parents. Here it so happens that, since the wife has no income of her own and neither of them has any substantial capital resources, the “family purse”, as I will call it, consists solely of the remuneration received by the husband from his employment. This in turn is devoted primarily to the common expenses of maintaining the home and family and of providing for such amenities as its limitations permit, but it is also liable to be called upon from time to time to meet exceptional expenditure incurred on behalf of any member of the family. Thus if one of them were to meet with a serious injury requiring costly medical treatment it would not be surprising to find resort being had by common consent to this family purse.

Can a valid distinction be drawn between a requirement on the part of one of the spouses for financial support to discharge the anticipated expenses of, let us say, a major surgical operation and a similar requirement in regard to the expenses of matrimonial proceedings instituted against the other spouse? The breakdown of amicable relations as between husband and wife usually constitutes to a great or lesser degree a personal tragedy for one or both of them, and where there is a child, a tragedy also for him. Where this occurs one or other of the spouses may take steps to terminate the marriage or both may be content, should all efforts at reconciliation fail, to live out their lives in the married state but under circumstances conducive possibly to misery for one or both of them. In my opinion, if there are sufficient grounds to justify her taking such legal proceedings and her financial position is such that she would otherwise be unable to do so, a wife is *prima facie* entitled to have resort to the family purse for the purpose of those proceedings. This would be particularly the case when the husband had already had resort to the same source for the purpose of defending such proceedings.

Turning now to a consideration of the authorities upon which reliance was placed by counsel, it must be remembered that by s. 3 of the Matrimonial Causes Act (Cap. 152) the jurisdiction of this Court under the Act is to be exercised, subject to the provisions of the Act, in accordance with the law applied in matrimonial proceedings in the High Court of Justice in England. This injunction, in turn, has to be construed in the light of the relative provisions of the Matrimonial Causes Rules, 1957, of England, which, although not in quite identical terms, correspond very closely to those of r. 70 (3) of our Rules.

Allen v. Allen (supra) is perhaps distinguishable from the present case for there the court had made an order for alimony pendente lite and, although the wife had separate property which was more than sufficient for payment of her costs, the husband was required to give security since to direct otherwise, the court felt, would interfere with the effective operation of the order for alimony. In the present case alimony has not been ordered.

In *Williams v. Williams (supra)* the facts were somewhat unusual. The wife, who was the petitioner, applied unsuccessfully to the registrar for security for costs three days before the hearing of the action, which was tried with a special jury, commenced, and at the conclusion of the hearing (in which the jury disagreed) she applied to the court by way of appeal from the registrar again seeking an order for security. In declining to interfere with the decision of the registrar Hill, J., said (at p. 118):

“The main object of security, in recent years at any rate, is that justice may be done by the wife being enabled to procure the assistance of solicitor and counsel and come to court. That is the main object in modern times. The old basis for the rule, namely, that all the wife’s property on marriage passes to the husband, and therefore the husband alone can foot the bill, has gone altogether, and now you must consider whether in the circumstances the wife can foot the bill, and it is a very important matter to consider whether the solicitor can conduct the business without something in court to pay him up to setting down and without security. Here it is quite obvious that the solicitor could, and was willing to, conduct the business up to a point, without security, and indeed he only applied for security a very short time before the case came on for trial, but he did apply and it was refused. It was in his power then to appeal or to say to the wife: ‘I am very sorry I cannot go on: I am out of funds and the matter must stand over until something is done, until I have got some order against the husband.’ But in fact he did neither of these things . . . When the trial started counsel for the wife made his application that the question of security should be kept alive. It is quite clear that briefs had then been delivered and witnesses brought up from the neighbourhood of Birmingham; therefore it cannot be said in this case that it was essential to the administration of justice that the wife’s solicitor should be put in funds.”

In the case now before me the application has been made at an early stage of the proceedings and the considerations which militated against the wife in *Williams’* case are absent.

The decision most closely resembling in its facts the present case is that in *Luff v. Luff* (*supra*) where the wife, being apparently without means, had borrowed a sum of £35 and paid it to her solicitors for the prosecution of the suit and then sought an order for security. The registrar, having estimated the probable costs at the sum of £75, directed the husband to find security for the costs in that amount, but the court set aside this direction and held that, since the wife had already managed to procure a sum of £35 which she applied towards the costs, she required only a further £40 to make up the estimated £75. No issue was raised here as to the granting of an order for security in principle and the dispute was only as to quantum.

A somewhat similar position arose in *Peters v. Peters*, [1950] P. 28, where both parties were “poor persons” for the purposes of the Rules of Court, and it was held, reversing the registrar, that where the petitioning wife had already handed over to her solicitor a sum for costs, that sum must be deducted from whatever amount would otherwise have been proper to secure to her by an order. “The proposition is well established,” said Pilcher, J. (at p. 30), “that a wife is nowadays granted security for costs or part of her costs for the protection of the solicitor conducting her case”.

I can see nothing in any of these decisions which would indicate that the practice in England is in any material respect different from what I conceive to be the practice properly to be adopted and followed in this country.

For the reasons which I have indicated I am satisfied that the petitioner is entitled to security and accordingly I direct that the order of the deputy registrar be set aside and that he do ascertain from the bill already filed the sum required in the event of costs being awarded to the petitioner in the suit. I further direct that security be given by the respondent to cover the sum so to be ascertained less by the amount already deposited by the petitioner with her advocates, and that if necessary the form of security be settled in Chambers.

Appeal allowed.

For the appellant:

P. J. Ransley (instructed by *Archer & Wilcock*, Nairobi)

For the respondent.

Shah Vershi Devshi & Co Ltd v The Transport Licensing Board
[1970] 1 EA 631 (HCK)

Division: High Court of Kenya at Nairobi
Date of judgment: 11 March 1970
Case Number: 89/1969 (136/70)
Before: Simpson J
Sourced by: LawAfrica

[1] *Licensing – Transport licensing – Revocation of licence – Refusal of renewal of licence not a revocation – Transport Licensing Act (Cap. 404), s. 13 (K.)*

[2] *Prerogative Orders – Certiorari – Right of appeal no bar to application for certiorari.*

[3] *Natural Justice – Opportunity to dispute limitations on licence – Transport Licensing Board not warning that imposition of conditions contemplated – No breach of natural justice.*

[4] *Statute – Rules made under statutory powers – Whether regulation ultra vires the Act – Transport Licensing Act (Cap. 404) (K.). Transport Licensing Regulations, reg. 15 (K.).*

[5] *Licensing – Transport Licensing – Board required to consider whether applicant a citizen – Does not empower Board to consider whether shareholders or employees of applicant company are Africans – Transport Licensing Regulations, reg. 15 (K.).*

[6] *Constitutional Law – Discrimination – Public acts – Refusal of Transport licence to citizens by reason of their Asian origin – Discrimination – Constitution of Kenya, s. 82 (K.).*

[7] *Constitutional Law – Interpretation of Constitution – Person includes company – Constitution of Kenya, ss. 82, 123 (K.).*

Editor's Summary

The applicant company had been refused the renewal of some of its transport licences and had had the area of operation of the remainder reduced by the respondent on the ground that it was necessary to remove imbalances between Kenya citizens. In the reasons it was stated that the licences were revoked.

The applicant applied for an order of certiorari to quash the refusal, on the grounds that the respondent had no jurisdiction to revoke licences, had contravened the principles of natural justice in giving the applicant no opportunity to meet the proposed reduction of the area of operation, that reg. 15, Transport Licensing Regulations was ultra vires the Act, that the respondent had failed to exercise its discretion properly, and that its decision discriminated against Kenya citizens of Asian origin.

Held –

- (i) the applicant had a right to apply for certiorari notwithstanding the existence of a right of appeal;

- (ii) the respondent had not revoked any licences but had refused their renewal;
- (iii) the applicant knew that the respondent contemplated the refusal of renewal of its licences and could not complain that conditions had been imposed;
- (iv) the Transport Licensing Regulations, reg. 15 is not ultra vires the Transport Licensing Act;
- (v) reg. 15 does not empower the respondent to consider whether members or employees of a company are Africans or non-Africans;
- (vi) a company is a person for the purposes of the Constitution;

- (vii) the applicant had been accorded different treatment attributable mainly to the race of its shareholders whereby a privilege or advantage had been refused to it;
- (viii) the respondent had therefore treated the applicant in a discriminatory manner.

Application allowed.

No cases referred to in judgment.

Judgment

Simpson J: This is an application by a limited company for an order of certiorari to remove into this court and quash a decision of the Transport Licensing Board “revoking” five of the applicant’s “B” licences and restricting the area of operation of seven others.

In 1968 the applicant held various licences issued under the provisions of the Transport Licensing Act (Cap. 404). On or about 29 November 1968 the applicant applied to the Transport Licensing Board for the grant of new licences for the year 1969 in substitution for the existing licences which would have expired on 31 December 1968 were it not for the provisions of s. 10 of the Act by virtue of which they continued in force until the disposal by the Board of the application for new licences.

The application was first considered by the Board on 17 February 1969 when counsel for the applicant was requested to supply certain information. At the next meeting on 27 March 1969 the Board further considered the application and by letter dated 21 April 1969 it informed the applicant of its decision.

The applicant’s advocates then wrote to the Board stating that they intended to appeal and requiring the Board to furnish the reasons for its decision.

The Chairman of the Board in a letter dated 8 May 1969, replied as follows:

“I refer to your letter of 30 April 1969 on the above subject and have to state as follows:

1. 2 ‘B’ licences for carriage of petroleum products and 3 ‘B’ licences for carriage of general goods were revoked by the Board in order to remove imbalances that is existing at the moment between Kenya citizens. You will no doubt also bear in mind that some of the shares in the company are not owned by citizens.
2. It was also necessary to reduce the area of operation in order to give opportunities to other people to operate in other areas.”

An appeal to the Appeals Tribunal established under the provisions of s. 19 of the Act was duly filed on 12 May 1969. This appeal has not yet been listed for hearing.

On 17 July the applicant filed an application in this court for leave to apply for an order of certiorari which leave was duly granted.

It is not clear why the present application which, being for an order in the nature of an immediate remedy, is one normally given the highest priority has not come before the court until now.

It was I think accepted by State counsel who ably represented the respondent Board that the Board is a body exercising quasi-judicial functions with a duty to act judicially when determining applications before it. The existence of an

alternative remedy does not preclude the applicant from seeking relief by way of certiorari and although it can hardly be said that speedy justice, the object of certiorari, has been achieved in this case the remedy of certiorari appears nevertheless to be speedier than the alternative one of appeal to the Appeals Tribunal. I am satisfied that the applicant is entitled to ask for an order of certiorari.

For the applicant several grounds were put forward on which relief was sought. It is sufficient I think to refer to the following five grounds:

1. The Board had no jurisdiction to revoke the applicants' licences.
2. There was a failure to act in accordance with principles of natural justice.
3. The Board took into consideration the provisions of reg. 15 of the Transport Licensing Regulations as amended by the Transport Licensing (Amendment) Regulations, 1968 which is ultra vires the Act and the Constitution.
4. The Board failed to exercise its discretion properly under the Act and the Regulations made thereunder.
5. The Board's decision reflected discrimination against Kenya citizens of Asian origin thus violating fundamental rights under the Constitution.

The first ground can be briefly disposed of. The Board informed the applicant that the licences in question had been "revoked". Section 13 of the Act gives the Board power to revoke licences in certain circumstances. Since none of these circumstances exist in the present case, the Board had no jurisdiction to revoke the licences. It is abundantly clear however that no licences were in fact revoked.

The Board considered the applications for renewal of the applicant's licences and decided to refuse such renewal in some cases. The term "revoke" was used loosely in disregard of the technical meaning given to it in the Act.

With respect to the second ground senior counsel for the applicant submitted that the principles of natural justice had been contravened in that the applicant was given no opportunity by the Board to make representations against reduction of the area covered by seven of the licences. In the first place it must be observed that although the applicant's advocate set out in a letter to the board a resumé of the proceedings at the first hearing which was generally accepted by the Board there is no record of the proceedings of the second hearing. Apart from counsel's statement from the Bar we have no knowledge that reduction of the area of operation was not discussed.

Be that as it may, s. 7 of the Act empowers the Board to grant a licence subject to such conditions as it may see fit to impose and s. 8 (2) of the Act sets out various conditions which the Board may attach to licences including in the case of "B" licences (sub-s. (2) (f))

"a condition that they shall be so used only in a specified district or between specified places."

The applicant was aware that the Board contemplated a refusal to renew its licences. It cannot complain that no indication was given that renewal subject to conditions was also contemplated.

It may well be, since we have no record of the proceedings, that it was as a result of the persuasive arguments put forward on behalf of the applicant that the Board decided not to refuse these licences but to grant them subject to conditions. This was the only ground of any substance relating to these seven

licences. The reason given by the Chairman in para. 2 of his letter of 8 May was I think not one which would entitle this court to interfere.

I come now to the third ground. Regulation 15 (3) of the Transport Licensing Regulations as amended by the Transport Licensing (Amendment) Regulations, 1968 reads as follows:

“The Licensing Authority shall in the exercise of its discretion to grant or to refuse any application or to grant a licence subject to such conditions as it may see fit to impose, have regard to whether the applicant is a citizen of Kenya or if the applicant is a company, to whether the members and employees of that company are citizens of Kenya.”

The regulations are made by the Minister under the powers given to him by s. 30 of the Act which (so far as relevant) provides:

“The Minister may make regulations for any purpose for which regulations may be made under this Act and for prescribing anything which may be prescribed under this Act and generally for the purpose of carrying this Act into effect . . .”

Section 7 is one of the sections in which matters are prescribed under the Act. It reads as follows:

“7. The Licensing Authority shall have full power in its discretion either to grant or to refuse any application for any licence, or to grant a licence subject to such conditions as it may see fit to impose, and in exercising its discretion, the Licensing Authority shall have regard primarily to the public interest, including the interest or interests of persons requiring, as well as those of persons providing, facilities for transport, and to such other matters as may be prescribed.”

There is a proviso which is immaterial for present purposes.

It was submitted by counsel for the applicant that the ejusdem generis rule applies but the mention of one species does not constitute a genus. In construing s. 7 it is to be noted that the words “including the interest or interests of persons requiring as well as those of persons providing, facilities for transport”, are in parenthesis qualifying the expression “public interest”. Disregarding therefore these words in parenthesis the section reads “the Licensing Authority shall have regard primarily to the public interest . . . and to such other matters as may be prescribed”. Although the ejusdem generis rule is inapplicable “such other matters” obviously should not conflict with “the public interest” which is defined in s. 2 as meaning “the interests and convenience of the inhabitants of Kenya as a whole”. While one can envisage the Authority in the application of reg. 15 (3) reaching a decision contrary to the public interest I am not prepared to hold that the matters prescribed by the sub-regulation are inconsistent with the public interest. Bearing in mind also the scope and policy of the Act I am not persuaded that reg. 15 (3) is ultra vires.

We were also invited to refuse to give effect to this sub-regulation on the grounds that it is vague and uncertain and confers an unguided power to discriminate.

No authority was cited to us with respect to the amount of guidance which legislation should provide to statutory boards in the exercise of their discretion. It is by no means uncommon for legislation to set out the matters to which such boards may or shall have regard without further guidance and I can see no justification for refusing to give effect to this sub-regulation.

No serious attempt was made to show that reg. 15 (3) is ultra vires the Constitution of Kenya.

The relevant section of the Constitution of Kenya is s. 82 and since further reference will have to be made to this section I quote the material provision thereof.

“82(1) Subject to subsections (4), (5) and (8) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.

(2) Subject to subsections (6), (8) and (9) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

(3) In this section, the expression “discriminatory” means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connexion, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

(4) Subsection (1) of this section shall not apply to any law so far as that law makes provision –

(a) with respect to persons who are not citizens of Kenya:

.....

(6) Subsection (2) of this section shall not apply to –

.....(a) anything which is expressly or by necessary implication authorised to be done by any such provision of law as is referred to in sub-section (4) of this section;.....

While sub-s. (1) prohibits legislation with discriminatory effect sub-s. (4) (a) expressly excludes from such prohibition a provision “with respect to persons who are not citizens of Kenya”.

Reg. 15 (3) is such a provision and is not therefore ultra vires the Constitution.

The applicant’s fourth and fifth grounds are founded upon discrimination between Kenya citizens of Asian origin and Kenya citizens of African origin as shown in the Chairman’s letter of 8 May 1969 which I quoted earlier.

It is I think clear that the main reason for refusing the 5 “B” licences was the removal of imbalances “existing at the moment between Kenya citizens”.

The Chairman of the Board having filed no affidavit to explain what he meant by these words I have to endeavour to interpret them in the light of all the surrounding circumstances. As already mentioned the proceedings of the Board’s second meeting were not before us. Some indication of the earlier proceedings is contained in Mr. Gautama’s letter of 17 February 1969 to the Chairman of the Board. The contents of this letter which were “generally agreed” by the chairman are as follows:

“I refer to the proceedings this morning before the Board when I appeared along with Mr. Ramnik Shah, Advocate, for Shah Vershi Devshi & Company Limited in response to the Board’s letter reference T.L.B. 399 dated 1st February 1969 which was received by my clients on 13th February. For the sake of good order and to ensure that there is no misapprehension whatsoever at the next meeting of the Board to which my clients application was adjourned by the Board I deem it desirable to confirm as briefly as possible what transpired at the meeting.

Your goodself opened the meeting by pointing out that the meeting had been convened to consider my client's applications for 'B' and 'C' Licences as advertised in the Official Gazette of 31st ultimo. You then pointed out that my clients had several licences in the region of some 18 both 'B' and 'C' for which they wanted further licences. You then proceeded to detail the 12 vehicles in respect of which my clients hold 'B' licences and 6 vehicles in respect of which they hold 'C' licences.

You then proceeded to state that in the beginning of 1968 when my clients applied for 1968 licences that the Board at first refused my client's application on the ground that my client company was mainly owned by non-citizens. You then pointed out that after the Board's refusal my clients applied to the High Court and that the Board was then represented by the Attorney-General's Chambers.

You also pointed out that subsequently as a result of some discussions between yourself and a Minister of the Kenya Government and an interview between your goodself and Mr. Malde of my client company licences were granted. You pointed out that during the discussion between yourself and Mr. Malde there was some discussion concerning proposed participation of Africans in my client company's transport business.

You then detailed the following three points which you stated the Board had in mind:

1. That these licences should be refused on the ground that the majority of shares in my client company are owned by non-citizens.
2. That the Government's policy is to discourage monopoly businesses and our clients have far too many licences.
3. Alternatively the Board would have to consider, if it did not refuse the licences altogether, whether the number of licences should be reduced.

You then drew my attention to the Transport Licensing Regulations and particularly to the recent amendment as per Legal Notice 264 of 1968 to regulation 15. You also pointed out that even if the entire shareholding was held by citizens the Board was still entitled, if it so desired, to refuse licences. It was also pointed out by you that my client company was a family concern and even the citizen shareholders and directors were members of the same family, and you would wish to be satisfied that the shares had been genuinely transferred to them.

I then made representation that I should be granted an adjournment to enable me to take detailed instructions from my clients since we did not have any indication as to what sort of information was required of us. After some discussions the Board acceded to my request for adjournment and at my request you stated that what the Board required specifically was information and evidence relating to the following matters:

1. How many members of our client company are citizens and how many are non-citizens.
2. How many shares are held by citizens and how many shares by non-citizens.
3. Evidence as to the dates when shares were registered in the name of the citizens.
4. What efforts have been made to have African participation.

I shall be glad if for the sake of the record and clarity you would be good

enough to confirm that what I have set out above represents accurately what transpired this morning so as to enable me to come fully prepared to assist the Board at its next meeting in its deliberations on my client's application."

It will be seen that the Board was inclined to refuse licences on one of two grounds.

- (a) That the majority of shares in the company were owned by non-citizens, or
- (b) That the Government's policy was to discourage monopoly businesses and the company had far too many licences.

In an affidavit dated 14 July 1969 the Manager of the company stated:

"The applicant company was incorporated in Kenya and the majority of the shareholders and members and employees of the applicant company are citizens of Kenya."

This is somewhat ambiguous. It may be read disjunctively or conjunctively. It may refer either to three separate majorities or to a combined majority in which employees would no doubt form the largest number.

In para. 10 however it is stated that the Board was furnished with the information and evidence sought and having regard to the wording of the Chairman's letter of 8 May 1969, it can I think be assumed that the Board was satisfied that the majority of shareholders are Kenya citizens and that the majority of shares are held by Kenya citizens.

Did the Board then refuse the licences because the company had too many licences? Is that the "imbalance" to which the Chairman refers? I have no doubt that had this been the ground of refusal he would have stated it in clearer terms. Such a refusal could perhaps have been justified in the interests of "persons providing facilities for transport".

Having regard to the contents of the letter of 17 February 1969 stressing as it does citizenship and African participation, and the fact that the company is clearly an Asian concern, I am satisfied that by "the imbalances existing at the moment between Kenya citizens" the Chairman is referring to Kenya citizens of African origin on the one hand and Kenya citizens of non-African origin on the other.

The company as such is not a citizen but the Board has considered the citizenship of the individual shareholders as it is entitled to do under reg. 15 (3) which enables it to have regard to the question whether or not the shareholders are citizens of Kenya.

The Board is not empowered by reg. 15 or by any other regulation to have regard to whether members and employees of a company are Africans or non-Africans nor in my opinion can the expression "the public interest" appearing in s. 7 of the Act be construed as permitting such discrimination. Had it been possible so to construe it the amendment of reg. 15 would have been unnecessary. I am of the view therefore that the Board failed to exercise its discretion properly.

The fifth ground involves a consideration of the provisions of s. 82 of the Constitution of Kenya.

Under s. 82 (2) a public authority such as the Board is forbidden to treat any person in a discriminatory manner by virtue of any written law or in the performance of its functions.

"Discriminatory" is defined in sub-s. (3). It includes affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race. By virtue of the definition of "person" in s. 123 (1) of the

Constitution the applicant company is a person. It has been afforded different treatment attributable mainly to the race of its shareholders whereby a privilege or advantage has been refused to it which would have been accorded to it had its membership been otherwise. I was not impressed by the submission of counsel for the Board that despite the definition of "person" s. 82 must be read as applying only to individuals.

Subsection (2) is subject to the provisions of sub-s. (6), (8) and (9) of s. 82.

The only provision which is material is that contained in sub-s. (6) (a).

The treatment of the applicant by the Board is neither expressly or by necessary implication authorised by any provision of law. Regulation 15 (3) permits it to make a distinction between citizens and non-citizens but not between different classes of citizens.

The Board accordingly, has treated the applicant in a discriminatory manner in contravention of s. 82 of the Constitution.

Having regard to the foregoing I would grant the application with costs to the applicant in so far as it concerns the five licences the renewal of which was refused by the Board.

Application granted.

For the applicant:

S. C. Gautama and R. R. Shah (instructed by *Shah and Shah*, Nairobi)

For the respondent:

T. B. H. Phillips (Senior State Counsel)

Uganda v Polasi [1970] 1 EA 638 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	1 June 1970
Case Number:	83/1970 (137/70)
Before:	Dickson J
Sourced by:	LawAfrica

[1] *Criminal Practice and Procedure – Revision – Appeal withdrawn – Court may revise illegal sentence – Criminal Procedure Code, ss. 328A, 341 (U.).*

Editor's Summary

An accused was sentenced to an illegal term of imprisonment. He filed an appeal but withdrew it and it was thereby deemed to have been dismissed. The sentence was subject to confirmation and had not been

confirmed.

Held – the court has power to revise the illegal sentence.

Sentence reduced.

Cases referred to in judgment:

- (1) *R. v. Sironga*, [1918] 7 E.A.L.R. 148.
- (2) *Suleman Ahmed v. R.*, [1922] 9 E.A.L.R. 19.
- (3) *Lobozi son of Katabaro v. R.*, [1956] 23 E.A.C.A. 583.
- (4) *Michael son of Meshaka v. R.*, [1962] E.A. 81.
- (5) *Serisite Luyombya v. Uganda*, [1965] E.A. 698.
- (6) *Kiwala v. Uganda*, [1967] E.A. 758.
- (7) *S. (An Infant) By Parsons (His Next Friend) v. Recorder of Manchester*, [1970] 2. W.L.R. 21.

Judgment

Dickson J: The accused Polasi Kasumba, a first offender and a mechanic aged 21 years appeared before a Chief Magistrate charged of

attempted theft of a motor vehicle contrary to ss. 255A and 370 of the Penal Code. He pleaded not guilty. On 29 October 1969, after a full trial, the accused was convicted by the Chief Magistrate of the offence as charged and he was sentenced to seven years' imprisonment.

On 30 October 1969, the accused filed a notice of appeal against his conviction and sentence. On 10 December, he gave notice in writing to the Registrar withdrawing his appeal. Under the circumstances, his appeal was abandoned and by operation of law it was deemed to have been dismissed, under s. 328A (3) of the Criminal Procedure Code, without a judge having seen the record.

This case, subsequently came to my notice, when perusing the monthly returns of cases submitted to this court by magistrates for inspection.

The sentence of seven years' imprisonment for the offence charged is, clearly illegal, in that it is in excess of the maximum period prescribed by law. The Penal Code Act, does not create a special penalty for attempted theft of a motor vehicle, as it does for example, for attempted murder, attempted rape, attempted unnatural offences and so on. It therefore follows, the instant offence is punishable under s. 370 of the Act. It is not punishable under s. 371 of the same Act, albeit theft is a felony, because the latter section is applicable only to attempt to commit felonies which are punishable with death or imprisonment for a period of 14 years and for the theft of a motor vehicle the maximum penalty is seven years only (s. 255A of the Penal Code Act).

Section 370 of the Penal Code Act reads:

"Any person who attempts to commit a felony or a misdemeanour is guilty of an offence, which, unless otherwise stated is a misdemeanour."

By s. 24 of the Act, a misdemeanour for which no punishment is specifically provided, it is punishable with imprisonment for a term not exceeding two years. In the instant case, the maximum term of imprisonment which the trial magistrate could have imposed is two years.

Naturally, on observing a manifest illegality in the record, my immediate reaction was to consider correcting it, by the exercise of my revisional powers under s. 341 of the Criminal Procedure Code as there was an obvious error involving a miscarriage of justice.

I sent the file to the Director of Public Prosecutions for his comments and his first reaction was, that as the appeal was deemed to be dismissed under s. 328A (3) of the Criminal Procedure Code, applying *Michael son of Meshaka v. R.*, [1962] E.A. 81 and *Kiwala v. Uganda*, [1967] E.A. 758, the High Court is functus officio. He further said, the accused may either appeal to the Court of Appeal for East Africa or apply to the High Court to allow his abandoned appeal to be restored.

The matter was set down for hearing and Mr. Kirenga was assigned to represent the accused.

On the date of hearing, Mr. Ssekandi, Principal State-Attorney, who represented the Director of Public Prosecutions, resiled from the previous stand taken by his department and indeed, fully argued that this court had not lost its jurisdiction in making a revisional order. As is to be expected, Mr. Kirenga agreed with his arguments. I am indebted to both advocates for their assistance

In *Serisite Luyombya v. Uganda*, [1965] E.A. 698, the appellant had given notice of abandonment of his appeal under s. 328A of the Criminal Procedure Code. Later, application was made for leave to withdraw the notice of abandonment although the Criminal Procedure Code makes no provision for such application. The Chief Justice dismissed the application in the following terms:

“This application is refused as incompetent for under s. 328A (3) the appeal was deemed to have been dismissed in law. I am of the opinion that this application amounts to an abuse of legal process, for the appeal having been dismissed by operation of law, it was not competent for counsel to have sought to revive it. The court is functus officio.”

On an appeal from that order, it was held by the Court of Appeal, that the appellate courts in Uganda have an important jurisdiction to allow an abandoned appeal to be restored, if it can be shown that the notice of abandonment was given by mistake or fraud such as to involve a possible failure of justice in the event of the appeal not being restored. It was further held, that an application to withdraw notice of abandonment is not necessarily an abuse of legal process, because, there may be cases in which, although functus officio, an appellate tribunal will use its inherent jurisdiction to declare such a notice a nullity, and allow the appeal to be restored.

It is quite apparent from that case, that an abandoned appeal may be restored in a proper case on application by an appellant. It is observed in the instant case, the appellant has not applied and, a pertinent question to be asked here is: Can the High Court of its own motion restore an abandoned appeal? I take the view that in as much as an abandoned criminal appeal may be restored where the court is functus officio, this court can of its own motion, in the exercise of its revisional powers, under s. 341 of the Criminal Procedure Code, where there is a fundamental illegality make a revisional order without an accused person applying, in the case where an appeal had been previously dismissed by the mere operation of law under s. 328A (3) of the Criminal Procedure Code.

The case has come to this court’s notice in the exercise of its functions. The accused, it would seem, was unaware of the illegality of the sentence. I think it could be safely said, if he was aware, he would not have withdrawn his appeal. Once this state of affairs has come to the notice of the High Court what must it do, when it is by s. 3 of the Judicature Act 1967, enjoined to exercise general powers of supervision and control over a magistrate’s court, coupled with specific powers of revision under s. 341 of the Criminal Procedure Code? The court is clothed with authority to correct errors. Must the High Court in these circumstances go and ask the accused to make an application to withdraw his notice of abandonment? I should think not. Here it is seen the accused is sentenced to undergo imprisonment for seven years – a sentence which exceeds the legal limits by five years and accordingly, there is a gross illegality. It is in these circumstances, the clear duty of this court, notwithstanding the fact that the accused has abandoned his appeal, to invoke the provisions of s. 341 of the Criminal Procedure Code and cure the illegality. I would hold that in the circumstances of the case, even if this court is functus officio, it has jurisdiction under its revisional powers to correct the formidable error of the trial Magistrate, which has clearly occasioned a miscarriage of justice.

If, on the authority of *Luyombya’s* case (*supra*), the appellate courts in Uganda, have an important jurisdiction to allow an abandoned appeal to be restored under certain circumstances, equally, at least, if not à fortiori, they have a similar jurisdiction in the exercise of their revisional powers to correct an error which has occasioned a failure of justice, notwithstanding the abandonment of an appeal.

Further, it also appears to me that where an appeal has been abandoned deliberately and, as a result the appeal, by operation of law is deemed to have been dismissed, even without the court seeing the record, if the case is of such a nature that it is subject to s. 8 of the Criminal Procedure Code which deals with sentences requiring confirmation (and the instant case is one of such, as the

accused was sentenced to a period of imprisonment of two years and over), the sentence is still subject to confirmation and that being so, the High Court had not yet exercised all its powers over the matter and, is therefore not functus officio. It is of interest to note that, under s. 9 (4) of the Criminal Procedure Code, it is provided that subject to the provisions of sub-s. (2) of s. 341 of the Act (which subsection deals with the requirement of the Director of Public Prosecutions and accused being heard), the High Court may exercise the same powers in confirmation as are conferred upon it in revision. In the instant case, the High Court had not completed its task as the sentence of seven years was subject to confirmation.

I cannot apprehend how it could be right, if a fundamental illegality affecting sentence is brought to the notice of this court following an abandonment of an appeal, it would be powerless to correct it by the exercise of its powers of revision. In the instant case, no judge of the High Court was aware of the illegality of sentence until after the abandonment of appeal and, only when examining the record of proceedings thereafter.

Although not exactly in point, I think part of the following passage from the speech of Lord Morris in *S. (An Infant) By Parsons (His Next Friend) v. Recorder of Manchester*, [1970] 2 W.L.R. 21 is not irrelevant:

“If, before the court has completed its task in regard to the case, an application to withdraw the plea is made and if it is made for reasons which the court deems valid and which perhaps it had previously had no opportunity of considering, is the court powerless to accede to it? It would be lamentable if that were so.”

It would certainly be lamentable, in the circumstances of this case, if this court in the absence of an application by the accused to withdraw his notice of abandonment of his appeal, could not reduce the sentence to its legal limits by the exercise of its revisional powers. The appeal was never considered on its merits.

The facts in *Kiwala v. Uganda*, [1967] E.A. 758, are not in any way similar to the case in hand and, really nothing useful may be extracted from it which would assist this court in considering this matter. In that case the appellant was convicted of stealing and was sentenced to a fine of Shs. 5,000/- or 18 months' imprisonment, in default. He appealed and applied for bail. On the hearing of the application for bail a judge of the High Court reduced the sentence to six months. The State then petitioned the High Court for a revision of the sentence and, the Chief Justice made a revisional order, setting aside the sentence and substituting for it six years' imprisonment without the option of a fine. The appellant appealed to the Court of Appeal, claiming that the Chief Justice had no jurisdiction to make this order, the matter having been dealt with on revision.

It was held the order of the judge reducing the sentence was not made on appeal and, could only have been made in the exercise of his powers of revision under s. 341 of the Criminal Procedure Code. It was also held the Chief Justice had no jurisdiction to proceed to a further revision of the sentence, as the matter had already been revised. The basis of that decision as I see it is that the law provides for one revision; no provision is made for further revision or for the High Court to revise its own order of revision.

In *Michael son of Meshaka v. R.*, the Court of Appeal referred to *R. v. Sironga*, [1918] E.A.L.R. 148 and *Suleman Ahmed v. R.*, [1922] E.A.L.R. 19 where it was said that an order confirming a sentence does not prevent consideration of the sentence in the course of an appeal. In *Lobozi son of Katabaro v. R.*, [1956] 23 E.A.C.A. 583, also referred to in *Michael's* case, it was said the same rule applies to an order confirming a conviction. In *Michael's* case, the court continued by

saying, a sentence of a subordinate court, which is merely confirmed by the High Court remains a sentence of the subordinate court. But where a conviction of a subordinate court has been set aside by the High Court, exercising revisional powers, a conviction of another offence has been substituted and a sentence has been imposed by the High Court in lieu of the sentence imposed by the magistrate, the order of the magistrate has gone and the operative order is that of the High Court.

It therefore follows that, where the High Court has interfered with a conviction or sentence in revision, it cannot subsequently deal with the matter and is functus officio. A conviction or sentence merely confirmed remains that of the subordinate court and an appeal lies to the High Court.

For the reasons stated above this court is competent by virtue of its revisional powers to set aside the illegal sentence of seven years' imprisonment, and it is accordingly set aside.

There is no reason to interfere with the conviction. The accused was rightly convicted.

As to sentence, this court observes that thefts of motor vehicles are very prevalent, there can be no doubt that owners of these vehicles continue to suffer from these anti-social activities.

A sentence of 18 months' imprisonment is substituted for the illegal sentence of seven years.

Sentence reduced.

For the prosecutor:

F. M. Ssekandi (Principal State-Attorney)

For the accused:

E. S. Kirenga (instructed by Kirenga & Co., Kampala)

Ruwenzori Coffee Curing Co Ltd v Said
[1970] 1 EA 642 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	5 June 1970
Case Number:	471/1969 (138/70)
Before:	Goudie J
Sourced by:	LawAfrica

[1] *Bailment – For reward – Standard of care – Bailee liable for value of goods lost when lorry stolen – Negligence – Failure to take adequate precautions against theft.*

[2] *Carriage – By road – Of goods – Carrier bailee for reward – Carrier liable for value of goods when lorry stolen – Negligence – Failure to take adequate precautions.*

Editor's Summary

The defendant undertook for reward the carriage by lorry of bags of coffee for the plaintiff. During the night the driver left the lorry unlocked and went to a restaurant about 100 yards from where it was parked. There were two turn boys under the tarpaulin at the back of the lorry. The lorry was stolen and its load lost. The plaintiff sued for the value of the coffee.

Held –

- (i) it was an implied term of the contract of bailment that the defendant would take proper care of the goods bailed (*British Road Services v. Arthur Crutchley & Co.* (1) applied);
- (ii) the onus was on the defendant to show that the loss was not due to any negligence on his part;
- (iii) the defendant had failed to take adequate precautions.

Judgment for the plaintiff.

Cases referred to in judgment:

(1) *British Road Services Ltd. v. Arthur Crutchley & Co. Ltd.*, [1968] 1 All E.R. 811.

(2) *Pillais Secondary School v. Kampala Service Station Ltd.* (Uganda High Court Civil Suit 434 of 1968) (unreported).

Judgment

Goudie J: The plaintiff company sues the defendant for negligence in the loss of 125 bags of coffee collected by the defendant from the plaintiff company's factory at Fort Portal for delivery to the Coffee Marketing Board in Kampala.

It is undisputed that the defendant was not a common carrier, that there were no special conditions of carriage, that the carriage was for reward, and that any liability incurred by the defendant was as a bailee for reward.

The issues agreed at the commencement of the suit were:

- (1) Were the goods lost by the negligence of the defendant?
- (2) If so, what was their value?

The undisputed facts were that the defendant had been carrying coffee for the plaintiff for over a year at an agreed rate of transport charges but without any special conditions of carriage. It was left to the defendant to choose the type of lorry and he used a Mann lorry with a tarpaulin at the rear. On the morning of 11 May 1969 the defendant sent his lorry with a driver and two of his own turn boys to the plaintiff company's factory to collect coffee for transport and delivery to the Coffee Marketing Board in Kampala.

The defendant's driver reached Kampala at about midnight and stopped for a soft drink at a restaurant leaving the lorry about 100 yards away with the two turn boys under the tarpaulin at the back of the lorry. The driver heard the sound of the lorry moving off and left the restaurant and met one of the turn boys coming to report that the lorry and its contents had been stolen.

It seems, and it was not disputed, that the other turn boy was driven off with the lorry but re-appeared next day.

The lorry was traced to the Congo Border but it being held by someone there and has, up to the present time, never been returned. The coffee was insured by the plaintiff but not by the defendant. They apparently commenced insuring loads at the suggestion of the defendant himself.

The liability of a bailee for reward for care of goods entrusted to him for carriage was considered in *British Road Services Ltd. v. Arthur Crutchley & Co. Ltd.*, [1968] 1 All E.R. 811. In that case it was said that it was an implied term of the contract of bailment that the defendants would themselves, or through their servants or agents, take "proper care" of the goods bailed. It was further held that, on the facts of that particular case, "the defendants' system of protection was not adequate in relation to the special risks involved and, accordingly, the defendants had failed to discharge the burden of proving that the loss was not due to any negligence on their part."

As I myself pointed out in Civil Suit 434 of 1968, *Pillais Secondary School v. Kampala Service*

Station Ltd., this may sometimes seem to amount to a “counsel of perfection” and I think it may in the instant case. Whilst stressing that the duty is to take “proper care” and not “perfect care”, it is nevertheless true that the onus rests on defendants to discharge the burden of proving “that the loss was not due to any negligence on their part” and that if there were special risks

involved the special precautions taken must be “adequate” in relation thereto. The authorities are, however, to the effect that it is only reasonably foreseeable risks which must be guarded against and not remote or “fantastic” ones. In the present case the particular type of lorry used was not a completely closed lorry, it was one which was known to be capable of being started without an ignition key, although it would have been possible to install a “cut off” device for a comparatively small sum whereby an ignition key would be necessary to start the engine. A crook-lock to secure the clutch to the steering wheel was provided but I consider the balance of probabilities favours the view that the driver did not use it. I am also not persuaded that he even locked the cabin. I do not say it would have been impossible for someone to have duplicate keys of the cabin, the crook-lock, and even the ignition, but it is, in my view, improbable that someone should happen to be at the particular place at the particular time to be able to use them on the defendant’s lorry at the completion of a drive which had taken altogether about fifteen hours when the driver just happened to stop somewhere for a drink. The driver said he called out to the turn boys at the back before leaving the lorry but he admitted that he did not wait for either of them to get out to keep watch. Even if I accept this evidence, the likelihood would be that at most they would turn over and resume their slumbers beneath the tarpaulin. Finally, the distances involved show conclusively that the defendant and the driver must have been fully aware that the lorry could not deliver the coffee the same day in working hours. Although hi-jacking is apparently not a common risk in this country, theft most certainly is, particularly at night. If the lorry was going to be parked 100 yards away out of sight of the driver it was, in my view, not a sufficient degree of care to leave two probably dozing turn boys under a tarpaulin at the back.

It might be argued that the plaintiff company also was well aware that the coffee could not be delivered the same day and therefore knew of the additional night risk. I do not think this is a valid argument for two reasons; first, the duty of care rests on the bailee and he cannot absolve himself of this merely by telling the bailor of his additional risk; secondly, it is a matter for the bailee to decide when to collect and deliver if no specific term of the contract governing this factor (*B.R.S. v. Crutchley (supra)*.)

On the issue of the value of the coffee lost, the defendant’s contention is that at most he can be liable for the basic value excluding any profit expected by the owner and that if the Company wished to claim for a profit element this should have been claimed as a separate item as “special” damages. In my view, however, the defendant is liable for all damage flowing from his negligence provided it is not too remote. Had the coffee lost been delivered in accordance with contract the plaintiff Company would have been entitled to be paid a profit element, not as a special profit, as in the case of a forward sale, but as a normal payment by the purchaser. I do not think bank interest on the lost coffee is in the same category. I calculate loss at 125 bags at Shs. 211/- per bag.

There will be judgment for the plaintiff company for Shs. 15,125/-, interest, and costs.

For the plaintiff:

J. Kateera (instructed by *Hunter & Greig*, Kampala)

For the defendant:

V. N. Ponda (instructed by *Ponda, Asaria & Co.* Kampala)

Uganda v Owino

[1970] 1 EA 645 (HCU)

Division: High Court of Uganda at Kampala
Date of judgment: 17 July 1970
Case Number: 616/1969 (139/70)
Before: Jones J
Sourced by: LawAfrica

[1] *Appeal – Jurisdiction – Acquittal – Complainant able to appeal – Magistrate’s Court Act, 1964, s. 30 (U.).*

Editor’s Summary

A complainant in a private prosecution attempted to appeal against the dismissal of the complaint and the chief magistrate held that he had no right of appeal.

On revision by the High Court:

Held – a complainant has a right of appeal against an acquittal.

Appeal remitted for hearing.

Cases referred to in judgment:

- (1) *Nunes v. R.* (1935), 16 K.L.R. 126.
- (2) *Mohanlal Karamshi Shah v. Ambalal Chotabhai Patel and Others* (1954), 21 E.A.C.A. 236.
- (3) *Uganda v. Ansolumu Kaumba* (1966 unreported).
- (4) *Hitila v. Uganda*, [1969] E.A. 219.

Judgment

Jones J: This case came before me in the following manner.

On 9 July 1969, the Director of Public Prosecutions wrote to the Chief Registrar a letter in the following terms:

“The Asst. Chief Registrar, The High Court of Uganda, Kampala. 9th July 1969.

Mbale Chief Mag. Cr.A. No. 79/68

Original Kisoko Magistrate’s Court’s Criminal Case MM 28/68

I have received a copy of the judgment of the learned Chief Magistrate, Mbale, in the above case. The said learned Chief Magistrate appears to have ruled that a complainant has no right of appeal against an acquittal. I am not sure whether the complainant/appellant was represented by counsel or not and in either case whether he is prepared to appeal to the High Court against the decision of the learned Chief Magistrate.

It is my view that the Director of Public Prosecutions has no locus standi in the case and he cannot,

therefore, much as he would have liked, appeal against the decision.

The ruling has far reaching consequences and in my view there appear to be arguable authorities on either side. It is my considered opinion that this is a case which should go the to High Court for a further consideration. I should be, therefore, grateful if you would be so good as to call for the relevant court records in this case and place them before a High Court

judge for his directions. I am, of course, assuming that Fabiano Owino, the original complainant, is not appealing against the decision of the learned Chief Magistrate.

(Sgd.) G. J. Masika

Dy. Director of Public Prosecutions.”

The record was sent for, and was placed before me.

I dealt with this under s. 339 of the Criminal Procedure Code as I considered the matter of considerable importance.

Summonses were issued to the appellant/complainant and the Director of Public Prosecutions to appear before this court, on the hearing of the revision. The former did not appear, but the Director of Public Prosecutions did.

Before I got down to preparing my ruling, I thought it would be grossly unfair if the complainant found himself at a serious disadvantage if I reversed the decision of the Chief Magistrate, without giving him an opportunity of coming to court, seising him of what was going on, and inviting him to air his views if he wanted to.

Mr. Radia very kindly went through his arguments once again in the presence of Owino. I explained to him what had happened and its significance. He understood fully what was happening. He elected to say a few words. He merely said the Chief Magistrate was correct and wanted to know where the wife was.

The facts, in so far as they are relevant, are set out in the first few paragraphs of the Chief Magistrate’s judgment:

“This is an appeal by the original complainant, Fabiano Owino, who had filed a complain in the court of a 3rd Grade Magistrate as a result of which his wife Philomera Nyadoi and Valantino Othieno were charged with 2 counts of elopement contrary to s. 121A (1) and (2) respectively of the Penal Code. The trial Magistrate acquitted the accused persons and the complainant is now appealing from that acquittal.

At the time of the hearing Mr. Odimbe, a State Attorney, was also present and had nothing to say regarding this appeal.

This appeal is obviously brought under s. 30 (1) (b) of the Magistrates’ Courts Act and the question which arises is whether the original complainant has the right of appeal under this section.”

The learned Chief Magistrate came to the conclusion that:

“It is my considered opinion that the appellant being the original complainant cannot appeal under the provisions of s. 30 of the Magistrates’ Courts Act. For these reasons this appeal being incompetent is dismissed.”

He relied in the main on the judgment of the Court of Appeal for Eastern Africa in *Hitila v. Uganda*, [1969] E.A. 219.

That case dealt with the rights of the Director of Public Prosecutions to appeal under s. 30 of the Magistrates’ Courts Act.

It was held that the Director of Public Prosecutions had no right of appeal under the Magistrates’ Courts Act.

The Chief Magistrate seems to have found further support for his conclusion in the findings of *Mohanlal Karamshi Shah v. Ambalal Chotabhai Patel and Others* (1954), 21 E.A.C.A. 236, which seems

to have cited the Kenya case *Nunes v. R.* (1935), 16 K.L.R. 126 with approval. These cases dealt with cases where there had been a conviction.

I am concerned here with the case of an acquittal.

The position of the Director of Public Prosecutions is clear. It is covered by s. 325 of the Criminal Procedure Code.

Has anyone else any right to appeal against an acquittal by reason of s. 30 of the Magistrates' Courts Act?

Section 30 reads:

"30(1) Subject to the provisions of this Act, an appeal shall lie as of right –

- (a) to the High Court from the judgments, decisions or orders of a magistrate's court presided over by a Chief Magistrate or magistrate grade I in the exercise of his original and appellate criminal jurisdiction;
- (b) to a magistrate's court presided over by a Chief Magistrate from judgments, decisions and orders of a magistrate's court presided over by a magistrate grade II or grade III in the exercise of his criminal jurisdiction."

The matter has been dealt with in two cases. The first was a Revisional Order of Sheridan, J., in Criminal Revision 491 of 1966, *Uganda v. Absolumu Kaumba*, where he said:

"Daudi Munyilwa, the complainant sought to appeal to the Chief Magistrate but the appeal was rejected on the ground that under s. 325 of the Criminal Procedure Code only the Director of Prosecutions could appeal against an acquittal. But here the learned magistrate overlooked s. 30 (1) (b) of the Magistrates' Courts Act, 1964 which gives an appeal as of right from a judgment or order of a Grade III Magistrate."

The second is the case on which the Chief Magistrate placed great reliance, *Hitila v. Uganda*, [1969] E.A. 219.

At p. 221, Duffus, J.A., as he then was, said:

"The Director of Public Prosecutions' right to appeal against an acquittal is specifically set out in s. 325 of the Criminal Procedure Code which states:

'When an accused person has been acquitted by a magistrate the Director of Public Prosecutions may appeal to the High Court from such acquittal on the ground that it is erroneous in law.'

There can be no doubt that this section was intentionally kept in force by the various amending acts. The 1964 Magistrates' Courts Act which repealed s. 323 of the Criminal Procedure Code and substituted the right of appeal by s. 30 also amended s. 324 of the Code which restricts the right to appeal in the case of a person who pleaded guilty, but s. 325 remained in its entirety. It would appear that Parliament intended that the right of appeal of the Director of Public Prosecutions was that given by s. 325 of the Code and that the Director was not one of those persons who have been given an unrestricted right of appeal under s. 30. Section 30 gives a right to appeal against any judgment, decision or order of the Magistrate *and this would include an order of acquittal*, so that if it was intended to give this unrestricted right to the Director of Public Prosecutions then Parliament would not have retained s. 325 which would then have been superfluous. Parliament must be deemed to have fully considered all the circumstances in this matter and to have intentionally retained the special provisions for appeals by the Director of Public Prosecutions under s. 325, and the

presumption that Parliament intended that this section should be the section giving the Director of Public Prosecutions the right to appeal in the circumstance herein set out, and did not intend that the general right of appeal given s. 30 should extend to the Director of Public Prosecutions.”

A criminal should hardly appeal against his acquittal. As the Director of Public Prosecutions’ rights to appeal against an acquittal are set out in s. 325 of the Criminal Procedure Code, s. 30 of the Magistrates’ Courts Act must mean some person other than the Director of Public Prosecutions or the accused. It can only be the complainant. It is couched in the widest terms.

It is my view therefore that if the Director of Public Prosecutions does not take over the conduct of a private prosecution, which he can undoubtedly do under s. 86 (1) of the Criminal Procedure Code, the private prosecutor has a right of appeal given to him under s. 30 of the Magistrates’ Courts Act, 1964, on an order of acquittal. In England private people can appeal even to the Lords.

I therefore send the case back to the Chief Magistrate to hear the appeal by the complainant in this case on its merits.

Order accordingly.

The appellant appeared in person.

For the Director of Public Prosecutions:

M. P. Radia (Senior State Attorney)

Unta Exports Ltd v Customs [1970] 1 EA 648 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	17 June 1970
Case Number:	403/1968 (141/70)
Before:	Goudie J
Sourced by:	LawAfrica

[1] *Civil Practice and Procedure – Notice – Given to advocate – Valid – East African Customs Management Act, 1952, s. 181 (2).*

[2] *Civil Practice and Procedure – Filing of document – Document filed when fees paid.*

Editor’s Summary

The Commissioner-General of Customs gave notice to an advocate with whom he had been in correspondence over a claim. The court’s register showed that the consequent action was filed on 14 September, but the court file and the fees receipt showed the date of 16 September. The defendant

contended that the action was time-barred.

Held –

- (i) notice was properly given to the advocate for the claimant;
- (ii) no document is properly filed until the fees have been paid.

Judgment for the defendant.

No cases referred to in judgment.

Judgment

Goudie J: The plaintiff company is claiming an order against the defendant, the Commissioner-General of Customs, for the release of ten tons of Cambodian rice seized by customs.

The defendant has taken a preliminary point that the plaint is time-barred by reason of s. 161 of the East African Customs Management Act, 1952. This section gives to the Commissioner power, on receipt of a claim, either to institute proceedings for condemnation or

- “(a) by notice in writing to the claimant, require the claimant to institute proceedings for the recovery of such thing within two months of the date of such notice”

Subsection (3) provides that where the Commissioner has given such notice and the claimant has not instituted proceedings within two months the thing claimed shall be condemned and forfeited.

The defendant contends that the relevant notice was given but the plaint was filed one day out of time.

The plaintiff company contends that the plaint was filed within the permitted time and, alternatively, that the notice given by the Commissioner was not a valid notice as it was given to the plaintiff company’s advocate and not to the plaintiff, which he says is prescribed by s. 181 (2) of the East African Customs Management Act, 1952.

As regards the time of filing of the plaint the advocates are agreed that if it was filed on 14 September 1968 it was within time, if on 16 September 1968 it was out of time.

The court file shows the plaint to have been filed on 16th, the fees are shown to have been paid on 16th, and the fees receipt is dated 16th. On the other hand, the court register of civil suits containing particulars of the suit contains a column in which the date of filing the plaint is shown as 14th and a letter has been produced on which a court clerk has written on the reverse that the letter was produced at the time of filing of the suit on 14 September 1968. I have not been able to put my hand on a decision covering this point, but I have in mind a decision which I myself gave following a decision on this very point by Ainley C.J. I have no doubt whatsoever that both as a matter of practice and also as a matter of law documents cannot validly be filed in the civil registry until fees have either been paid or provided for by a general deposit from the filing advocate from which authority has been given to deduct court fees. It is admitted there was no such general deposit in this case. The mere entry in the column of a Register or note by a clerk on the back of a letter certainly cannot override the omission to pay or provide for the necessary fees at the time of the alleged filing. I rule that the plaint was filed out of time, having not been properly filed until fees paid on 16 September 1968.

It is agreed that the claim was put in by plaintiff’s advocate and in its plaint para. 5 the plaintiff averred that “On the 8 July 1968 in conformity with the said amended notice of seizure the plaintiff’s advocates (acting as the plaintiff’s agent) gave to the defendant notice of claim under s. 159 of the Act . . .

Section 181 (2) (c) of the Act provides that the Commissioner when required to give a notice to any person, may do so –

- “(c) by sending it by post addressed to the person at his usual or last known place of address.” In my view, the “claimant was the advocate who put in the claim, albeit as agent for the plaintiff which he admits in his plaint. The advocate was likewise the “person” to whom the notice had to be sent since he was the “claimant”. The advocates had also held themselves out as agents for the plaintiff by their claim notice to the Commissioner of 8 July 1968. Finally, it is accepted practice irrespective of the particular Act, that notice to plaintiff’s advocate is in all normal circumstances notice to his client. Had the notice been given to the client after the claim he been made by the advocate acting as his legal agent, I could well imagine that the advocates would have complained that all “correspondence” should have been addressed to the advocate and not their client direct. From a practical point of view also by addressing the notice to the advocates and not direct to the client, the client was certainly not prejudiced

but was saved the time and trouble involved in having to pass on the notice to his advocates. He thus got additional time within which to file his plaint even though the time counted from the date of the notice and not the date of service in accordance with the provisions of s. 151 (1) (a) of the Act.

The plaint having been filed pursuant to a valid notice under s. 161 (a) of the Act and having been filed on 16 September 1968 which the plaintiff's advocate agreed was out of time, the provisions of s. 161 (3) come into operation. The goods are, therefore, condemned and forfeited to the State and the plaintiff company has no cause of action.

The plaint is dismissed with costs.

For the plaintiff:

A. H. O. Oder instructed by Mboijana & Co., Kampala)

For the defendant:

W. M. Wekasa counsel to the Community)

Empire Theatres Ltd v Tanzania Exhibitors Ltd [1970] 1 EA 650 (CAD)

Division:	Court of Appeal at Dar es Salaam
Date of judgment:	18 August 1970
Case Number:	1/1970 (142/70)
Before:	Duffus P, Georges CJ and Lutta JA
Sourced by:	LawAfrica
Appeal from:	The High Court of Tanzania – Mustafa, J.

[1] *Rent restriction – Possession – Order of court made before premises controlled – Application to execute – Court has jurisdiction to discharge or rescind – Rent Restriction Act (Cap. 470), ss. 19 (5) and 29 (1), (2) (T.).*

[2] *Statute – Retrospective effect – Jurisdiction to discharge or rescind orders already made – Not a retrospective operation – Rent Restriction Act (Cap. 479), s. 19 (5) (T.).*

Editor's Summary

In an action with respect to certain premises an order for vacant possession was made by a consent decree in 1962. The order was suspended on condition that the appellants pay arrears of rent, that the appellant was to remain in possession of the premises until 31 December 1966 provided no default occurred in payment of rent, and that all options for renewal were cancelled. On 1 January 1967 the Rent Restriction Act, 1962 was amended bringing commercial premises under control. On 1 February 1967 the

respondent, assignee of the interest in 1962 decree, sought leave to execute the order for vacant possession. The appellant claimed that the Act having on 1 January 1967 become applicable to the suit premises, it was entitled to remain in occupation as a statutory tenant by holding over and asked the High Court to discharge or rescind or suspend the order under the provisions of s. 19 (5) of the Act as amended. The trial judge, as a preliminary point of law, accepted that s. 19 (5) of the Act as amended did not apply retrospectively and granted leave to proceed with the execution. On appeal:

Held –

- (i) the trial judge erred in disposing the matter exclusively on the issue of the retrospectivity of s. 19 (5) and in not considering appellant's claim to remain in occupation as statutory tenants.
- (ii) the court has power to stay, suspend, discharge, or rescind any order for possession of premises whether the order for possession was made before after the enactment of the amending Act, which is not retrospective in operation, but which gives power to deal with orders already made.

Appeal allowed.

Cases referred to in judgment

- (1) *Remond v. City of London Road Property Company*, [1921] 1 K.B. 49.
- (2) *Marcroft Wagons Ltd. v. Smith*, [1951] 2 All E.R. 271.
- (3) *Murray, Bull & Co. Ltd. v. Murray*, [1952] 2 All E.R. 1079.
- (4) *Jivraj v. Devraj*, [1968] E.A. 263.
- (5) *Kotak Ltd. v. Kooverji and Another*, [1969] E.A. 295.

The following considered judgments were read.

Judgment

Georges C.J. This is an appeal from a decision of the High Court granting leave to the respondent decree holder to execute an order for vacant possession which formed part of a decree entered by consent in 1962. The court at the same time refused an application by the appellant – the second defendant in the original suit – to review, suspend, discharge or rescind that order.

The action in which the decree had been pronounced was for possession of certain premises used by the appellant as a cinema, and for the usual consequential relief. It had been adjusted under O. 23, r. 3 of the Civil Procedure Code by a decree dated 16 November 1962.

Paragraph I of this decree ordered possession of the premises and ejectment of the defendant but this was to be suspended on terms thereafter set out. In para. 2 the second defendant – the present appellant – was ordered to pay a certain sum by way of arrears of rent. Paragraph 3 provided for payment of this sum by instalments. Paragraph 6 read in part as follows:

“The order for possession shall be suspended provided that if and so soon as two consecutive defaults shall occur, that is to say, if any part of the rent referred to in proviso (i) of clause 8 hereof or of the instalments referred to in clauses 3 or 11 hereof shall remain unpaid for twenty-four (24) hours after the due date next after the date on which any default shall first have occurred, the order for possession and ejectment shall, upon application to the Court by or on behalf of the plaintiff, immediately become enforceable.”

Paragraph 8 provided:

“For so long as no breach occurs in fulfilling the terms of the aforesaid orders and subject in all respects to the foregoing terms hereof and to the provisos hereinafter appearing, the second defendant shall be entitled to remain in possession of the suit premises under the terms of the lease of 31 May 1956 referred to in paragraph 5 of the plaint PROVIDED that:

- (i) with effect from the first day of January one thousand nine hundred and sixty-three the rent shall be shillings three thousand seven hundred (Shs. 3,700/-) per month, payable on the twentieth day of each month commencing on 20 January 1963,
- (ii) all options for the renewal or further renewal contained in the lease shall be considered as cancelled and of no effect,
- (iii) the term created by the said lease is hereby extended to 31 December 1966 on which date it shall in any event expire and absolutely determine (unless possession shall lawfully have been previously obtained) and the second defendant shall deliver up to the plaintiff vacant possession of the suit premises on that day, unless the plaintiff shall previously have obtained possession

thereof under the terms of the aforesaid orders.”

Before 31 December 1966 the plaintiff in the suit, K. H. A. Jariwala, assigned his interest in the decree to Tanzania Exhibitors Ltd., the present respondents.

The premises were commercial premises and were not, at the date of the decree, controlled by any Rent Restriction Legislation. On 1 January 1967 the Rent Restriction (Amendment) (No. 2) Act came into force, bringing commercial premises under control. On 1 February 1967 the respondent filed an application to execute the decree dated 16 November 1962. When this application came up for hearing it was held not to be in order as no copy of the decree had been attached. It was adjourned to enable the respondent to put it in order. Thereafter nothing happened for two years.

On 18 April 1969 the application again came up for hearing. The appellant then took objection that the arrangement under which it occupied the premises was separate and apart from the decree and lay outside the scope of the suit. Hamlyn, J. ruled that this was not so and that the application should proceed. Thereupon on 13 May 1969 the appellant filed a notice stating that at the hearing of the application for leave to execute the decree he would apply to have the order for possession discharged or rescinded or suspended under the provisions of s. 19 (5) of the Rent Restriction Act as amended.

The basis of this application was the fact that:

“The Rent Restriction Act 1962 with amendments, having on 1 January 1967 become applicable to the suit premises of which the 2nd defendant was then the lawful tenant by holding over . . . no order for recovery of possession or for the ejectment of the second defendant from the suit premises may now be made or given unless for or upon any of grounds authorised by the fact (sic).”

Affidavits filed by both sides show that the appellant had made monthly payments of Shs. 3,700/- to the original plaintiff up to July 1967. These payments had been variously referred to in the correspondence as “rent”, “payment for occupation” and “mesne profits”. Eventually on 16 April 1968 there had been a consent order made on a summons between the original plaintiff and their assignee, the respondent, providing that:

“All rents accruing and accrued due as from 1 April 1968 be deposited in court.”

When this application came up for hearing in the High Court, advocate for the respondent stated that he intended to argue that whatever may have been set out in the appellant’s affidavit the appellant could not successfully oppose an application for leave to execute the decree and that if this argument succeeded it would dispose of the entire proceedings. The advocate for the appellant, who did not appear on this occasion, seemed rather uncertain in his stand. At one point in the proceedings he is recorded as agreeing that it would be better if preliminary points were taken first but later he is recorded as adhering to the view that it would be better if the court should hear the grounds on which his application was based. The court ruled that the matter should be taken as a preliminary point of law. There is no note that this was done by consent.

The advocate for the judgment creditor then took two points: (1) that on an application for leave to execute a decree the judgment debtor could be permitted to raise only two matters – (a) that the decree had been satisfied or adjusted; or (b) that it was time barred; (2) that the provisions of s. 19 (5) of the Rent Restriction Act as amended did not apply to these premises because the amending Act was not retrospective.

The trial judge rejected the first proposition but accepted the second and accordingly granted leave to proceed with the execution.

The burden of this appeal was that this was not in fact a proper case for determination on a preliminary point, that the affidavits disclosed that the appellant was not depending entirely on the retrospective effect of the amending Act for protection but was asserting that independently of any retrospectivity he was a tenant who had become entitled to protection on 1 January 1967 when the Act came into force. He drew attention particularly to the paragraph of his notice already quoted above which contended that at the date on which the amending Act had come into force he was lawful tenant of the premises by holding over. The advocate pointed out also that the trial judge was well aware that the application was not based solely on the retrospectivity of s. 19 (5), and quoted from the judgment a sentence which reads:

“The second defendant’s application is based primarily on s. 19 (5) of the amending rent act.”

He argued that the word “primarily” clearly implied the existence of some other basis for the application which still remained undisposed of. He urged that the judge should have considered whether or not, on the facts disclosed in the affidavit, the appellant was on the 1 January 1967 at least a tenant under sufferance who would be protected by the Act when it came into force that day. In this regard he placed much emphasis on *Remon v. City of London Real Property Company Limited*, [1921] 1 K.B. 49. The appellant had, for two years at least, been paying monthly sums which had on occasion been described as rent and there should have been considered the issue as to whether or not he had become a tenant during that period.

I agree that the judgment of the judge does not deal with any other issue but that of the retrospectivity of s. 19 (5) of the amending Act. I think it is clear also on a careful analysis of the appellant’s application and his affidavit that he was putting forward alternative grounds in support of his right to remain on the suit premises. These have not been discussed nor has any ruling been made on them. The question arises as to whether or not this court should deal with the matter or whether matters of fact will have to be determined which will make it more convenient to have the application remitted to the High Court for further hearing and determination.

I am of the view that it would be preferable to have the matter remitted.

In his judgment the judge held that the order for possession in this case could not be reviewed under s. 19 (5) of the amending Act 57 of 1966 because the Act did not have retrospective effect.

This particular issue was not very thoroughly argued on appeal, Mr. Salter preferring to direct the force of his argument to the contention that the application should not have been disposed of on a preliminary point. For this reason it is with some diffidence that I express an opinion on it. I am not persuaded, however, that the approach which I outlined in *Kotak Ltd. v. Kooverji and Another*, [1969] E.A. 295 is wrong. On this point I am happy to note that my Lord President in his judgment, which I have had the advantage of reading in draft, agrees with my approach in that case.

The section is not retrospective as Spry, J.A. (as he then was) pointed out in *Jivraj v. Devraj*, [1968] E.A. 263 in the sense of invalidating orders made before the Act. What it does is to give the court power in future to review them. In the words of Sir Clement de Lestang it provides “machinery for dealing with uncompleted matters in the future”.

This situation is not affected by s. 29 (2) of the Amending Act.

Mr. Lakha indicated that he would not press his cross-appeal on the first argument advanced as to the issues which a judgment debtor could raise on an application by the decree holder for leave to execute a decree. On that argument the judge had ruled against him. I agree fully on that ruling and the reasons therefor and I can usefully add nothing further.

Accordingly I would allow the appeal and dismiss the cross-appeal with costs.

Duffus P: The facts in this appeal have been fully set out in the judgment of the Chief Justice which I have had the advantage of reading in draft form.

There were really two applications before the High Court in this matter. First an application by the respondent in this appeal, The Tanzania Exhibitors Ltd. the assignors of the original plaintiff, under O.21, r. 20 of the Civil Procedure Code for execution to issue against the appellant company, the second defendant in the suit, more than one year after the date of the decree. The second application, which followed as the result of the first application, was made by the second defendant when showing cause against the issue of execution, and was under the provisions of s. 19 (5) of the Rent Restriction Act (Cap. 479) for relief against the execution.

There were thus two matters for consideration by the judge. First whether the appellant company had shown cause why execution should not issue or whether in any event relief should be granted him under s. 19 (5).

The judge quite properly heard these applications together but he took as a preliminary point the issue as to whether or not the provisions of s. 19 (5) of the Rent Restriction Act could apply in this case.

He decided this preliminary point against the appellant company. He held that s. 19 (5) was not retrospective and he dismissed the appellant company's application under this section with costs but then having found that no cause had been shown to the contrary he granted leave to the respondent to execute the decree as prayed. With respect the judge in making this order, does not appear to have considered the facts set out in the affidavit of the first defendant who is also a director of the appellant company. The appellant company claimed that the order for delivery of possession of the premises should not issue as its status as occupiers of the premises had changed and that it had by virtue of the various facts deposed to in the affidavit become a statutory tenant and was as such entitled to remain on the premises. The appellant company were in effect claiming that a new contract had been entered into between the parties and that accordingly the original decree should not be carried into effect. It appears to me that if the appellant company established that it was entitled to remain in occupation as a statutory tenant, then this must be a sufficiently good reason why the order should not issue. The question whether the appellant company could also claim relief under s. 19 (5) was in fact a separate application and if the court found that good cause had been shown why execution should not issue, then a decision under s. 19 (5) need not have been given. I agree with the Chief Justice that in this case the judge having found that s. 19 (5) did not apply does not appear to have really directed his mind as to whether the appellant company had shown good cause why the order for possession should not issue and that for this reason apart from anything else this matter will have to be sent back to the High Court for a re-hearing and determination.

I am of the view, however, that this court should also determine whether the judge was correct in his interpretation of s. 19 (5) of the Rent Restriction Act. The interpretation given to this section by the trial judge is quite different from that given by the High Court in the case of *Kotak Ltd. v. Kooverji*, [1969] E.A. 295 T.

Section 19 (5) of the Rent Restriction Act (Cap. 479) reads as follows:

“19(5) At the time of the application for the making of any order for the recovery of possession of any premises, or for the ejectment of a tenant therefrom, or, in the case of any such order which has been made, whether before or after the passing of this Act, and not executed, at any subsequent time, the court making or executing the order, as the case may be, may adjourn the application, or stay or suspend execution on any such order, or postpone the date of possession for such period or periods as it thinks fit, and, subject to such conditions (if any) in regard to payment by the tenant of arrears of rent, and otherwise, as the court thinks fit, and, if such conditions are complied with the court may, if it thinks fit, discharge or rescind any such order.”

This subsection was enacted by the Rent Restriction (Amendment) (No. 2) Act, 1966 which came into operation on 1 January 1967. This was the same amendment Act which applied the Rent Restriction Act to commercial premises. The judge whilst agreeing that the words of s. 19 (5) did at first sight give the impression of having a retrospective effect was of the view that the provisions of the transitional s. 29 (1) and 29 (2) of the amended Act nullified any retrospective effect of s. 19 (1). These provisions are:

- “29(1) Where, at the commencement of this Act, any claim, application, proceedings or other matter, or any appeal, is pending before any Rent Restriction Board established under section 5 of the principal Act as in force immediately before the commencement of this Act or before a court or the High Court, the same may be continued and concluded by the Board, the court or the High Court, as the case may be, as if this Act had not been enacted.
- (2) Every order, decision, determination or judgment of a Board, court or the High Court in any claim, application, proceedings or other matter commenced before the commencement of this Act may be enforced, and, where an appeal is lodged against any such order decisions determination or judgment, any decision on such appeal may be enforced in the manner provided by the law in force immediately before the commencement of this Act.”

The judge also referred to the common law rule that the rights of a party are decided according to the law as it existed when an action began and also to the provisions of s. 10 of the Interpretation and General Clauses Ordinance (Cap. 1).

All these provisions however depend on the express words of the legislation being interpreted. In my view the meaning of sub-s. (5) of s. 19 is clear. The subsection refers to an order for possession which has been made either before or after the passing of the Act and which order has not been executed, and then the subsection gives specific jurisdiction to the court “executing” the order to exercise the very wide powers set out in the sub-section by which the court may delay discharge or otherwise deal with the order of possession.

This subsection does not really have a retrospective effect but rather it gives jurisdiction to the court to deal further with an order of possession already made.

In my view the transitional provisions of s. 29 do not in any way restrict or interfere with the jurisdiction given by s. 19 (5). Subsection (1) of s. 29 does not apply but sub-s. (2) does apply but this subsection provides that the possession “may be” enforced in the manner provided by the law in force immediately before the commencement of this Act. This is not a mandatory provision and it in no way interferes or takes away the new jurisdiction given to the court to deal further with an order for possession which has been already

made but not executed. In fact sub-s. 19 (5) expressly gives the court jurisdiction to deal with such orders whether made before or after the commencement of the Act.

This matter was fully considered by the Chief Justice in his decision in the *Kotak Ltd.* case and in dealing with sub-s. (2) of s. 29 he said:

“It would not appear to me that this subsection does materially alter the situation. If s. 19 (5) is retrospective in the sense that creates a power to review in future orders made prior to the enactment of the amendment, then it is clear that the ‘law in force immediately before the commencement of the Act’ would have been affected by the Act to the extent that orders could be reviewed under the Act.

For these reasons, I would myself be of the opinion that the court did have power to review the order for possession made in this case.”

Admittedly the Chief Justice’s view was obiter and he expressed some doubt as to the relationship between s. 29 (2) and s. 19 (5) but I entirely agree with his interpretation of s. 19 (5). I would also refer here to the decision of this Court in *Jivraj v. Devraj*, [1968] E.A. 263, and to the views expressed by the Vice-President and by Spry, J.A., as he then was, and as quoted by the Chief Justice in the *Kotak Ltd.* case. Here again these were only obiter observations, but they do support my view of s. 19 (5).

I am therefore of the view that the High Court in considering whether or not to order that the order for the possession of these premises should be executed has jurisdiction to consider the application already made under s. 19 (5) of the Rent Restriction Act.

I agree with the Chief Justice that the cross-appeal be dismissed.

I would therefore allow this appeal and set aside the orders of the High Court dismissing the application and ordering that leave to execute the decree be granted and I would further order that the applications be sent back to the High Court for re-hearing and determination. The cost of the first hearing in the High Court will be in the discretion of the judge re-hearing the matter. I would allow the appellant the costs of this appeal and of the cross-appeal and as the other judges of the court also agree, it is so ordered.

Lutta JA: I also agree and have little to add. In my view when the decree was passed, it determined any interest the appellants had in the suit premises, and as the decree had not been executed the matter was properly before the court as a pending cause and as such, it would be governed by the law in force before the Rent Restriction (Amendment) (No. 2) Act, 1966 came into force. I think this is the kind of situation s. 29 (2) of the Transitional Provisions is intended to cover. However, it seems to me that the latter provision is declaring the common law rule that where there is an alteration of the law during the pendency of a suit, the rights of the parties to that suit are to be governed by the law in force when the suit was filed, in the absence of an express provision to the contrary. I do not think that s. 29 (2) is intended to fetter the powers of the court under s. 19 (5) of the Act. Section 19 (5) of the Act does confer powers on the court to “stay or suspend execution on any such order or postpone the date of possession . . . and discharge or rescind any such order”. It is immaterial whether such order was made before or after the coming into force of the amending Act. It is for the tenant seeking protection of s. 19 (5) of the Act to establish to the satisfaction of the court that he is entitled to remain in occupation of the suit premises, notwithstanding the determination of the contractual terms with the respondent. His status as a statutory tenant or not is a matter to be inferred from the facts or circumstances of his case – see

Marcroft Wagons Ltd. v. Smith, [1951] 2 All E.R. 271 and *Murray, Bull and Co. Ltd. v. Murray*, [1952] 2 All E.R. 1079. It seems to me that if the court is satisfied that he is a statutory tenant, protection will be granted under s. 19 (5) of the Act.

Appeal allowed.

For the appellant:

C. Salter, Q.C. and *P. S. Talati* (instructed by *Sayani, Balsara & Velji*, Dar es Salaam)

For the respondent:

A. A. Lakha (instructed by *Fraser, Murray, Roden & Co.*, Dar es Salaam)

Abdallah v Republic
[1970] 1 EA 657 (CAD)

Division:	Court of Appeal at Dar es Salaam
Date of judgment:	12 August 1970
Case Number:	102/1970 (144/70)
Before:	Spry Ag P, Law Ag VP and Lutta JA
Sourced by:	LawAfrica
Appeal from:	The High Court of Tanzania – Seaton, J.

[1] *Criminal Law – False pretences – Giving of post-dated cheque – Whether representation that sufficient funds to meet cheque.*

[2] *Evidence – Burden of proof – False pretences – Prosecution to prove parting with property induced by false pretence.*

[3] *Evidence – Confession – Admission of responsibility for sums signed for subsequently found short – Whether admission of theft – Admission to police – Inadmissible.*

Editor's Summary

The appellant, as Chairman of the Prison Officers Staff Club kept the club monies in the prison for safe custody. He was convicted of stealing money in respect of which he admitted responsibility for the entries in the cash book and also on two counts of obtaining money by false pretences by issuing post-dated cheques and falsely pretending that he had sufficient funds. On appeal:

Held –

- (i) an admission of responsibility for sums signed for is not an admission of theft if subsequently the sums are found short;

- (ii) an admission of theft to a police officer would be a confession and therefore inadmissible;
- (iii) the giving of a post-dated cheque is not a representation that there are sufficient funds to meet the cheque;
- (iv) the prosecution must prove that the false pretence induced the acceptor of the cheque to part with the money.

Appeal allowed.

Cases referred to in judgment:

- (1) *R. v. Dent*, 39 Cr. App. R. 131.

Judgment

The considered judgment of the court was read by **Law JA**: On 14 July we allowed this appeal and quashed the three convictions the subject of the appeal. We now give our reasons. The appellant, a regional superintendent of prisons, was charged in the District Court of Tabora District on six counts, three of stealing as a person employed in the public service, one

of fraudulent false accounting, and two of obtaining money by false pretences. He was acquitted on two counts by the resident magistrate. On appeal to the High Court the appellant was acquitted on one further count, so that this court is now concerned with three counts only, one of stealing and two of obtaining money by false pretences. The background to this appeal is that the appellant was at all material times the senior Prisons Officer in the Tabora Region, and as such ex-officio Chairman of the Prison Officers Staff Club. The profits from this Club were paid into a fund operated by the Club's treasurer and the monies were kept in the prison safe by the appellant for safe custody. The fund was used principally for the purpose of making loans to prisons officers.

As regards the first count with which we are concerned, on which the appellant was convicted of stealing Shs. 334/30, the evidence was that of one Abdulla Nondo, who was treasurer of the fund at the material time, and who had himself been convicted of stealing monies from the fund. The resident magistrate rightly treated Nondo's evidence with great caution. The appellant in a cautioned statement admitted initialling the entry in the cash book relating to this money but denied having actually received it. He said that he told Nondo to deposit the money directly in the bank. The resident magistrate convicted the appellant on this count without any clear finding as to whether or not he disbelieved the appellant, but chiefly because the appellant in his cautioned statement had admitted responsibility for the entries in the cash book for which he had signed. Mr. Mhaikar for the Republic was unable to support the conviction, for two reasons with which we entirely agree. Firstly, an admission of responsibility for sums signed for is not an admission of having stolen these sums if a shortage is subsequently discovered. Secondly, if the admission of responsibility did amount to an admission of theft, then the appellant's statement to this effect to a police officer was a confession and therefore inadmissible. Once this is excluded, there only remains the evidence of Nondo who is himself implicated and who was described by the resident magistrate as either "completely ignorant of what he was talking about or he deliberately chose to tell lies". Admittedly this remark was made in respect of Nondo's evidence on another count, but clearly Nondo was not a reliable witness and a conviction based on his evidence cannot in our view safely be allowed to stand.

As regards the fifth count, the appellant's salary in May 1967, was subjected to heavy and unexpected deductions, chiefly for income tax so that he was unable to meet his commitments for that month. He accordingly borrowed Shs. 1,000/- from the Club, and in exchange gave a post-dated cheque which was presented to the bank at the end of May and again at the end of June 1967, but was returned on each occasion marked "refer to drawer". The appellant's explanation was that his May salary, which should have been over Shs. 2,000/-, was reduced to Shs. 530/- as a result of unwarranted deductions which he hoped to have refunded in June but which were not refunded. The charge in respect of this count alleges that in giving this post-dated cheque the appellant was "falsely pretending that he had sufficient funds in his personal account" to meet the cheque. In our view the giving of a post-dated cheque is not a representation that there are sufficient funds to meet the cheque. It is a representation that when the cheque is presented on the future date shown on the cheque there will be funds to meet it. This is a representation as to a future event and cannot support a charge of obtaining money by false pretences, if the drawer of the cheque in fact has an account at the bank. It is a different matter of course if he has no account, because in drawing a cheque he is making the representation that he has an account, which is a false representation of an existing fact (*R. v. Dent*, 39 Cr. App. R. 131), but here the appellant did have an account at the bank on which the cheque was drawn. That the appellant, in giving the post-dated cheque, was not representing that he had sufficient funds to meet it is

clear from the undisputed fact that he asked the treasurer not to present it without prior reference to him, which was not done, so as to give him an opportunity of making arrangements with his bank to meet the cheque. In our view the conviction on count 5 cannot be supported.

There only remains the sixth count, which relates to an occasion when the appellant borrowed Shs. 100/- and gave a cheque of the same date in exchange, at a time when he knew he had insufficient funds in his account to meet the cheque. This could provide the basis of a charge of false pretences, but it is not clear from the evidence whether it was the pretence which induced the treasurer to part with the Shs. 100/-. As the editor of Kenny's Outlines of Criminal Law (18th Edn.), at p. 349 says, the handing over of the property must have been actually caused by the pretence, and prosecuting counsel should not omit to put an express question as to this. The actuation must be proved by direct evidence, not by inference. No such question was put in this case, and we are left in doubt whether the treasurer handed over the money because he was ordered to do so by his superior officer or because he was given a cheque by the appellant. We do not feel the conviction on this count can safely be allowed to stand. For these reasons we allowed the appeal and quashed the convictions and set aside the sentences. We feel that although the appellant acted foolishly and irresponsibly in drawing cheques which were of doubtful worth, he did so in the expectation that his financial position would improve as a result of repayments of excessive deductions from his salary, and that accordingly he had no general intent to defraud or otherwise act with criminality.

Appeal allowed.

For the appellant:

M. A. Lakha (instructed by *Kanabar & Company*, Dar es Salaam)

For the respondent:

V. D. Mhaikar (State Attorney)

Mwaitebele v Republic [1970] 1 EA 659 (CAD)

Division:	Court of Appeal at Dar es Salaam
Date of judgment:	11 August 1970
Case Number:	62/1970 (143/70)
Before:	Spry Ag P, Law Ag VP and Lutta JA
Sourced by:	LawAfrica
Appeal from:	The High Court of Tanzania – Bramble, J.

[1] *Criminal Law – Wrongful confinement – Accused allegedly local rate collector arresting and confining suspected tax defaulter – Ingredients of offence – Local Government Ordinance (Cap. 333), s.*

95 (4) (T.).

[2] Evidence – Wrongful confinement – Prosecution has to prove confinement then accused must prove on balance of probabilities that confinement was lawful.

[3] Criminal Practice and Procedure – Sentence – Imprisonment or fine – Solely in discretion of trial judge – Penal Code, s. 253 (T.).

Editor's Summary

The appellant was convicted of wrongful confinement by unlawfully arresting and confining persons alleged to have refused to pay local rates. His appeal to the High Court was dismissed but the sentence was reduced. On appeal to the Court of Appeal the appellant contended that (a) by virtue of s. 95 (4) of the Local Government Ordinance (Cap. 333) as a local rate collector he had authority to arrest without warrant any person whom he suspected to be a tax defaulter, and (b) the lower courts erred in sentencing him to a term of imprisonment without giving him the option of paying a fine under s. 253 of the Penal Code.

Held –

- (i) On a charge of wrongful confinement all the prosecution has to prove is the confinement then the accused must prove on a balance of probabilities that the confinement was lawful, which in this case the accused failed to do;
- (ii) s. 253 of the Penal Code does not give a convict right to opt to pay a fine. Whether to impose a fine or sentence of imprisonment, or both, is entirely a matter for the court's discretion.

Appeal dismissed.

No cases referred to in judgment.

Judgment

The considered judgment of the court was read by **Lutta JA**: This is a second appeal. The appellant who was the Executive Officer, Karagwe District Council, was convicted in the District Court of Karagwe at Kayanga on seven counts of wrongful confinement contrary to s. 253 of the Penal Code and sentenced to twelve months imprisonment on each count. His appeal to the High Court against conviction was dismissed.

The facts of the case as found by the trial magistrate were that on 8 January 1969 the appellant went to the Water Supply Camp at Karagwe to collect local rates for 1966, 1967, 1968 and 1969 from employees of the Water Supply Department. It was a pay day. He questioned a number of employees about payment of local rates for the years 1966, 1967, 1968 and 1969 and demanded payment from those persons who had not paid rates for any of those years. Among the employees from whom payment for the 1969 rates was demanded were Alphonse son of Magezi, Martin son of Tibaya Kishala, Mohamadu son of Ahamada, Yusuf Mohamed and Francis son of Munjirangabo (to whom for convenience we shall refer as “the complainants”). When the complainants failed or refused to pay the 1969 rates the appellant arrested and confined them in the Karagwe District Council Hall from 4.00 p.m. to 10.00 p.m. After 10.00 p.m. they were driven in a lorry along Ngara road for about nine miles and then returned to the Council Hall where they were released at 1 a.m. the following morning. The appellant admitted having arrested and confined the complainants in the said Council Hall during the specified hours but contended that he did so in accordance with instructions issued in 1964 by the Regional Commissioner, West Lake Region. The trial magistrate on the evidence found that the appellant acted unlawfully and convicted him accordingly. On the appeal to the High Court the judge upheld the convictions but varied the sentences to six months' imprisonment.

There are two grounds of appeal, viz –

1. that the judge erred in law in holding that the appellant had no authority to arrest the complainants as s. 95 (4) of the Local Government Ordinance empowered the appellant in his capacity as local rate collector to arrest without warrant any person whom he suspected to be a tax defaulter three months after the date the rate had become due for payment.
2. that the judge should have held that the trial magistrate applied a wrong principle in sentencing the appellant to term of twelve months without giving the appellant the option of paying a fine as provided by s. 253 of the Penal Code.

Mr. Tukunjoba, counsel for the appellant, argued that the appellant had power by virtue of his office as

the Executive Officer, Karagwe District Council, to arrest any person who had failed or defaulted to pay local rates. He referred to s. 95 (1) and (4) of the Local Government Ordinance (Cap. 333) and submitted

that the appellant as a rate collector under sub-s. 4 of this section had reasonable grounds to believe that the complainants had committed an offence under the provisions of sub-s. 1 of the section and therefore acted lawfully in arresting them. Mr. Tukunjoba did not draw the judge's attention or that of the trial magistrate to the provisions of s. 95 (1) and (4) of the said ordinance. We feel that it was necessary for the appellant to draw the attention of the courts below to the legislation which lays down the appellant's powers and duties for the proper determination of the matter. However, we are satisfied that notwithstanding failure to do so the judge arrived at a proper conclusion.

Mr. Mhaskar, for the Republic submitted that the appellant had not produced any evidence of his having been appointed a rate collector under s. 100 of the Local Government Ordinance and that in any event he had no authority to arrest the complainants for non-payment of the 1969 local rates as they were due for payment in January 1969. He argued that the burden of proving that the local rates were due was on the appellant and that he had not discharged it. We shall first consider the first ground of appeal. On a charge of wrongful confinement, all the prosecution has to prove is the confinement; it is then for the accused to show that there was no arrest and confinement or that he was justified in his action and that the confinement was lawful. From the evidence the trial magistrate found as a fact that the arrests and confinement were for non-payment of the 1969 local rates although the same were not yet due. Mr. Tukunjoba did not challenge that finding either in the court below or before us. We are not prepared to disturb that finding of fact. Section 95 (1) and (4) of the said Ordinance on which Mr. Tukunjoba relied is as follows:

- “95(1) Any person who neglects or fails to pay any rate payable by him to a District Council under this Ordinance within three months after the same becomes due and payable shall be guilty of an offence and shall be liable to a fine or to imprisonment for a term not exceeding three months unless he proves that such neglect or failure was due to poverty or other circumstances beyond his control:
- (4) Any rate collector may, without warrant, arrest any person whom he suspects on reasonable grounds of having committed an offence under the provisions of subsection (1).”

To justify the appellant's action, he must show, firstly, that he was a rate collector appointed under the provisions of s. 100 of the said Ordinance; secondly, that the complainants had neglected or failed to pay the 1969 local rates within three months after the same had become due. Section 42 (1) of the said Ordinance can only be of assistance to the appellant if the complainants had failed to pay the 1969 local rates within three months of the due date, and after the provisions of s. 91 of the said Ordinance have been complied with. In our view the appellant has failed to show on a balance of probabilities that his action was justified and accordingly this ground of appeal fails.

With regard to the second ground of appeal whereas we agree that the trial magistrate should not have imposed a maximum sentence of imprisonment, we are satisfied that the judge set the matter right, and cannot agree that s. 253 of the Penal Code confers powers on a convicted person to opt to pay a fine rather than serve a prison sentence. Whether to impose a fine or a sentence of imprisonment, or both is entirely a matter for the court's discretion.

We see no merit in this appeal and we dismiss it.

Appeal dismissed.

For the appellant:

S. B. M. Tukunjoba (instructed by *Tukunjoba & Co.*, Mwanza)

For the respondents:

V. D. Mhaskar and W. H. Sekule (State Attorneys)

Amisi and others v Uganda
[1970] 1 EA 662 (CAK)

Division: Court of Appeal at Kampala
Date of judgment: 22 July 1970
Case Number: 31/1970 (147/70)
Before: Duffus P, Spry VP and Mustafa JA
Sourced by: LawAfrica

[1] Evidence – Credibility – Prosecution witness – Discrepancy between evidence and statement – Duty of prosecution to reveal.

[2] Evidence – Witness – Prosecution’s decision not to call material witness – Duty to make witness available.

[3] Evidence – Witness – Statement to police – Should be read back to witness.

Editor’s Summary

The court dismissed this appeal but made observations about prior statements made by witnesses in criminal trials and the duty of the prosecution.

- (i) it should always be the practice of the police to read back a statement to its maker to ensure that it is correct;
- (ii) if the prosecution decides not to call a material witness, he should be made available to the defence, together (other than in exceptional circumstances) with his statement;
- (iii) when a witness is giving evidence for the prosecution, it is the duty of the prosecution to inform the defence of any material discrepancy between his evidence and his statement. This should be done in open court.
- (iv) where the accused is not represented disclosure should be made to the judge.

Cases referred to in judgment.

- (1) *R. v. Bryant and Dickson* (1946), 31 Cr. App. R. 146.
- (2) *Thairu son of Muhoro and Others v. R.* (1954), 21 E.A.C.A. 187.
- (3) *Yerimia Kalimedo v. R.* (1956), 23 E.A.C.A.

Judgment

The considered judgment of the court was read by **Duffus P:** This was a long and difficult trial in which the trial judge after a carefully considered judgment convicted and sentenced the three appellants for the offence of robbery.

There was no merit in any of the appeals but in the course of his judgment the judge had cause to make certain observations on the duties of a prosecutor with regard to statements made to the police and Senior State Attorney addressed us on this question and asked us to make a ruling on this matter which clearly is one of some importance in the due administration of justice in Uganda. We accordingly dismissed the appeals but reserved our reasons for further consideration of this question.

In the course of his judgment the judge said:

“Furthermore, at every trial witnesses are now cross-examined on statements made by them to the police.

It appears to be a common practice for police not to read back statements to witnesses, pleading lack of time and the lack of necessity for it. That makes the presentation of the case difficult.

Things have now come to such a pass that I suggest that the time has now come for the prosecutor, as an officer of the Court, to whom he owes a duty, not only to pass the statement made to a policeman by a witness, to a defence counsel when asked for it, at the time of cross-examination, but to inform the court at once; (whether the accused is represented or not), whenever there is a material discrepancy between the evidence given by a witness, and a previous statement made by him to the police. This would save a lot of time and trouble.”

We are surprised to note from this passage that apparently the police do not always read back the witness’s statement to the witness before he signs it. We should have thought that this would have been a matter of common practice in order to ensure that a correct and accurate statement is taken and clearly this should always be the practice followed by the police. The Evidence (Statements to Police Officers) Rules adequately sets out the procedure to be followed when taking statements from prisoners or suspected persons.

The practice and procedure to be followed in the use of police statements has been the subject of numerous articles and directions from various authorities and also judgments of the court. Basically in criminal cases the police, the advocate appearing for the Director of Public Prosecutions, the advocate for the defence and the court all have the same object and that is to discover the truth and in particular whether the accused person committed the offence for which he is charged.

A great deal depends on the prosecutor who in the magistrate’s court would most likely to be a police officer and in the High Court the advocate appearing for the Director of Public Prosecutions, and in his ability and integrity and his understanding of his duty to assist the court to arrive at the truth.

The question could be considered under two heads, that is,

- (a) Statements taken from a person who can give material evidence but whom the prosecution has decided not to call as a witness. In England (*R. v. Bryant and Dickson* (1946), 31 Cr. App. R. 146) the prosecution is under a duty to make that person available as a witness to the defence but is not under the further duty of supplying the defence with a copy of the statement taken. In our opinion the prosecution also has a similar duty in Uganda but we do suggest that, except there are some exceptional circumstances against this, the prosecution do also at the same time make the witness’s statement available to the defence. We make this suggestion having in mind the real difficulties that the defence might have in East Africa to obtain a statement;
- (b) Police statements of a witness giving evidence. There is undoubtedly a duty on the prosecution to inform the defence of any material discrepancy between the witness’s evidence and any statement made by the witness in their possession. We are also of the view that the statement itself should be made available to the defence. In the case of *Thairu son of Muhoro v. R.* (1954), 21 E.A.C.A. 187 this court called attention to a previous judgment of the court in criminal appeals 124 and 125 of 1945 where the court held that the advocates are entitled to see the statement of the prosecution witness and to cross-examine him on any discrepancies.

In the passage that we quoted from the judgment of Jones, J. in this case he also suggested that the prosecutor should inform the court as soon as he informs the defence of any material discrepancy whether the accused is represented or not. If the accused is represented then normally it is sufficient to inform the defence counsel of the discrepancy but the judge feels that there might be cases where the defence advocate does not make sufficient use of the contradictions in

the statement; we think that it would be good practice when the prosecutor does inform the defence of the contradiction that he does so in open court so that the trial judge would be aware of the matter.

There are cases though where the accused person is not represented and would be unable to take proper advantage of any discrepancies so as to establish that the witness is lying. In such a case the proper course would be to bring this to the notice of the trial judge or magistrate whose duty it would be to see that the interests of the accused person are protected. In the case of *Yerimia Kalimedo v. Reginam* (1956) 23 E.A.C.A. 503 at p. 504 this court said –

“We think it right, however, to say that we deprecate any practice whereby a trial judge calls for the whole of such statements at the beginning of a trial. If, during the course of trial, a judge has cause to believe that there may be a material discrepancy between a witness’s testimony and the statement made in the course of investigation and the accused is not legally represented, we see no objection to the judge calling for the statement in question and using it as material to test the credibility of the witness. But it is well known that such statements often contain inadmissible and prejudicial matter and the judge might well, as a matter of precaution, first inquire of Crown counsel whether any embarrassment is likely to follow from his seeing such a statement.”

It is difficult to lay down any fixed rules. It is largely a matter in the discretion of the trial judge or magistrate to see that justice is done.

Appeal dismissed.

The appellants appeared in person.

For the respondent:

P. F. Ayigihugu (State Attorney)

Lyimo v Abdallah
[1970] 1 EA 664 (HCT)

Division:	High Court of Tanzania at Dar es Salaam
Date of judgment:	29 May 1970
Case Number:	2/1970 (153/70)
Before:	Georges CJ
Sourced by:	LawAfrica

[1] *Landlord and Tenant – Rent – Recovery of – Claim not arising under Rent Restriction Act – Rent Restriction Act, 1962, s. 11A (1) (T.).*

[2] *Rent Restriction – Rent – Recovery of – Whether claim arising under Rent Restriction Act – Whether District Court’s jurisdiction ousted – Rent Restriction Act, 1962, s. 11 A (1) (T.).*

Editor's Summary

The respondent sued the appellant for arrears of rent in a District Court. There was no claim for possession. The rent of the premises had been fixed under the Rent Restriction Act, 1962. The appellant contended that the District Court had no jurisdiction to hear the suit.

Held –

- (i) the claim for rent arises out of the relationship of landlord and tenant and not under the Rent Restriction Act, 1962. The court accordingly had jurisdiction.

Appeal dismissed.

Cases referred to in judgment:

- (1) *Allarakhia v. Aga Khan*, [1969] E.A. 613.

Judgment

Georges CJ: In this suit the plaintiff claimed from the defendant the sum of Shs. 1,040/- “being arrears of rent due and owing by the plaintiff from the defendant for the period 1 April 1967 to 31 July 1968 at the rate of Shs. 65/- per month”.

In his written statement of defence the defendant denied owing rent. He claimed having paid rent at the rate of Shs. 130/- a month from 1 March 1967 to 29 February 1968. From 1 March 1967 the Rent Tribunal had a fixed standard rate of rent at Shs. 65/- a month. The effect of this was that he had overpaid the sum of Shs. 780/- which he was entitled to set off against the plaintiff’s claim for the months March to July 1968. He counterclaimed for Shs. 476/-, the sum which he alleged was still owing to him.

There was a reply to this written statement of defence in which the plaintiff contended that the last date on which the defendant had paid the rent was 1 March 1967, (the date from which the Rent Board had fixed the standard rent) and that since that date he had paid no rent.

This action was filed in the District Court Dar es Salaam and all documents in connection therewith are so intituled.

The hearing took place on 6 October 1969 before the Resident Magistrate. As could be expected there was only one issue on which there was a sharp conflict of evidence – whether or not the rent had been paid? The trial magistrate eventually found for the plaintiff on the basis of his receipt book which he produced to corroborate his oral testimony that the defendant had not in fact paid rent since 1 March 1967.

From this judgment the defendant has appealed, claiming that the trial magistrate should have refused to hear the matter on the ground that the District Court Dar es Salaam had no jurisdiction to try the suit. The basis of this argument is the Rent Restriction Act, 1962 (as amended) and in particular section 11A which to quote its relevant portions reads:

- (1) All claims, proceedings or other matters of a civil nature arising out of this Act or any of the provisions thereof and in respect of which jurisdiction is not specifically conferred upon, the Tribunal shall be commenced in the court . . . and the court shall have power to do all things which it is required or empowered to do by or under the provisions of this Act, and without prejudice to the generality of the foregoing shall have power . . .
- (b) to make orders, upon such terms and conditions as it shall think fit, for the recovery of possession and for the payment of arrears of rent or mesne profits, which orders may be applicable to any person, whether or not he is a tenant, being at any material time in occupation or possession of any premises;

Section 2 defines court as follows:

“ ‘The court’ means a court of Resident Magistrate of competent jurisdiction.”

Mr. Kesaria for the appellant contends, therefore, that this action should have been filed in the resident magistrates’ court in Dar es Salaam and not in the district court. He contends in effect that a claim for rent with respect to premises which come within the Rent Restriction Ordinance is a claim or proceeding of a civil nature arising out of the Act and that jurisdiction is vested exclusively in the court of the resident magistrate.

I cannot accept this proposition. A claim for rent, simpliciter, is not a claim which arises out of the Rent Restriction Ordinance. The claim is founded on the very nature of the relationship of landlord and tenant. The amount of rent payable is controlled under the Act. The recovery of possession is also controlled. All these controls in effect modify the terms upon which parties would be otherwise free to agree in entering into the relationship of landlord and tenant and they arise under the Act, but the obligation to pay rent itself does not arise under the Act and is, therefore, not affected.

Mr. Kesaria stresses in particular sub-s. (b) of s. 11A (1), This has already been quoted. It provides that the court shall have power to make orders for the “payment of arrears of rent”. This, however, is clearly in the context of granting remedies collateral to an order for possession. Where the issue, as here, is a pure and simple issue as to whether the standard rent has or has not been paid over a particular period this phrase cannot be applicable.

There was a further argument based on sub-s. (g) of s. 11A (1). This subsection makes it compulsory for the landlord to seek the permission of the court before levying distress. The contention was that since distress was a method of enforcing payment of rent and the Act imposed an obligation to go to the resident magistrate’s court before this was done, then it could not be contemplated that if another method of enforcement by way of suit was used instead that this could be dealt with by any other court but the resident magistrates’ court.

In my view this does not follow. There would be need to exercise some control over the landlord’s right to use a remedy as harsh as distress to recover his rent. The tenant’s possession could be made quite unbearable if the bailiff could be put on him on each occasion that his rent was seven days in arrear – more particularly when arrears of rent for thirty days do not under the Act automatically entitle the landlord to possession. Once the right to levy was being controlled it was the convenient thing to vest jurisdiction in the Court to which other powers had been given. An ordinary suit for rent, unlike distress, is not a weapon which can be used to make possession so uncomfortable that it would be surrendered. There was no reason to control that and I have seen nothing in the Act to show that it has been controlled. No doubt jurisdiction was conferred on the resident magistrates’ court in matters arising out of this Act because it was contemplated that not infrequently matters of law would arise which would require the skills of a professionally trained lawyer. Before the Amendment of 1962 there was a Rent Restriction Board presided over by a professionally trained lawyer which dealt with all the matters now placed under the jurisdiction of the resident magistrates’ courts. When this Board was abolished and the Rent Tribunal, presided over by a layman, set up to deal with the assessment of rent, the more complicated legal issues were entrusted for determination by the resident magistrates’ court. No complicated legal issues arise where the claim is one for rent alone and the defence is an assertion that it has been paid. No reference need be made to this Ordinance and indeed in the pleadings none was made except for the purpose of stating that the standard rent has been fixed as Shs. 65/- a month as from March 1967. This was not in dispute.

If this matter had been one which fell under the Rent Restriction Act, I would have followed the judgment in *Allarakhia v. Aga Khan*, [1969] E.A. 613, and I would have held that from the proceedings as they are it was clear that the matter had been determined in the District Court and that this court had no jurisdiction. Since I am satisfied, however, that the claim does not arise under this Ordinance the case of *Allarakhia* appears to me irrelevant and I would hold that the District Court did have jurisdiction to hear this case and to determine it.

Accordingly this appeal will be dismissed with costs.

Order accordingly.

For the appellant:

R. C. Kesaria

For the respondent:

M. J. Raithatha

Yesaya v Republic
[1970] 1 EA 667 (HCT)

Division: High Court of Tanzania at Dar es Salaam
Date of judgment: 27 February 1970
Case Number: 682/1969 (151/70)
Before: Biron J
Sourced by: LawAfrica

[1] Criminal Law – Forgery – Prison officer making false L.P.O.s – obtained money by cashing L.P.O.s – Whether falsification constituted forgery – Penal Code, s. 337 (T.).

[2] Criminal Law – Theft – By public servant – Prison officer pocketed money by cashing L.P.O.s – Whether money received by “virtue of his employment” – Meaning of “receives . . . any money on behalf of another” – Penal Code, ss. 262 and 270 (T.).

Editor’s Summary

The appellant, a chief prison officer, made out local purchase orders for special food. He then cashed these orders through one Lyimo, a shopkeeper, allegedly to buy high grade food for Arab detainees. The orders with requisite bills and authorisation were later forwarded by the appellant to the Ministry of Home Affairs in Dar es Salaam and Lyimo was paid by cheque in due course. The trial magistrate found that the appellant had pocketed the monies he received from Lyimo and that the names of the detainees mentioned in the orders were fictitious. He convicted the appellant of forgery but acquitted him of stealing holding that the appellant did not receive monies from Lyimo on behalf of his employer the Government. The appellant appealed against his conviction of forgery and the Republic cross-appealed against the acquittal of stealing.

Held –

- (i) the making of the false orders constituted forgery;
- (ii) the appellant received by virtue of his employment and his intention did not matter. (*Rajabu son of Mbaruku v. R.* (1) not followed).

Appeal dismissed; Cross-appeal allowed.

Cases referred to in judgment:

- (1) *Rajabu son of Mbaruku v. R.*, [1962] E.A. 669.
- (2) *Burton Mwakapesile v. Republic*, [1965] E.A. 407.

Judgment

Biron J: The appellant was charged on six counts, three of forgery and three of stealing by a person employed in the public service. He was acquitted on the charges of stealing and convicted on the charges of forgery, and he was sentenced to imprisonment for two years on each conviction, the sentences to run concurrently, and also concurrently with the sentences of imprisonment the appellant was currently serving. The appellant now appeals from his convictions, and the Republic cross-appeals from the acquittals on the three counts of stealing. The two appeals have been consolidated and heard together.

The undisputed facts are, briefly, as follows: The appellant was at the material times employed as a Chief Prison Officer in charge of the Kondo Prison. In his capacity as officer in charge of the Prison, the appellant made out in May, June and July 1967, three local purchase orders. The local purchase orders all purported to be for food for Arab remand prisoners. The first was for food for two Arabs to the value of Shs. 306/-, the second was for three Arabs to the value

of Shs. 465/-. and the third purported to be for food for four Arabs to the value of Shs. 620/-. These local purchase orders were handed by the appellant to one Julius Lyimo, who at the time owned and ran a shop and bar in Kondoa. This man testified that the appellant brought to him these local purchase orders on different occasions and told him that he needed to buy high grade food for Arab prisoners in the jail, that the hotel proprietors from whom he wished to buy the food were not prepared to let him have it on credit, so he needed the cash. He requested the witness to let him have cash in the sums set out in the local purchase orders, wherewith to buy the supplies he needed. The witness obliged and paid over to the appellant the monies shown in the local purchase orders, and the appellant subsequently brought him typed bills for supplies of cooked rice, meat, tea and bread, which altogether totalled the amounts paid by the witness, and the witness signed these bills. It is not in dispute that these bills were attached to the local purchase orders and duly forwarded by the appellant to the Ministry of Home Affairs in Dar es Salaam where after being examined and approved, cheques were issued payable to Julius Lyimo and dispatched to him.

It is common ground that these local purchase orders, which bore the names of nine Arabs for whom the food supplies were purportedly wanted, were not entered in the prison ration ledger. Both the prison officer who succeeded and took over the Kondoa prison from the appellant and the Senior Superintendent of Prisons, Mr. Mustafa Dachi, who at the material time was in charge of the Dodoma and Singida Regions prisons, Kondoa being in the Dodoma Region, testified that if these local purchase orders were proper and in order, they should and would have been entered in the prison ration ledger. These two witnesses further testified that on due research, it was ascertained that no prisoners bearing the names given in the local purchase orders were ever detained in the Kondoa prison. In addition, two Arabs who were detained in Kondoa prison round about the material times testified that all the food they received whilst in prison was brought to them from their homes. Both these witnesses who lived in Kondoa, one of them stating that he was born in Kondoa, testified that not only were none of the men named in the local purchase orders in Kondoa Prison at the material, or any part of the material times, but there were no persons bearing such names in Kondoa. The prosecution's case was, in a nut-shell, that the three local purchase orders were all forgeries as the names of the men set out therein were fictitious, that the appellant had forged them and had stolen the monies, the property of the Government, represented by the local purchase orders.

The appellant's case was that he had in fact purchased the food supplies shown in the bills attached to the local purchase orders, from Julius Lyimo, and he had not received any cash from him. Although he admitted that the local purchase orders were not entered in the prison ration ledger, he asserted that there was a special ledger for such prisoners who were entitled to a higher grade diet. However, both prison officers referred to, categorically stated that no such book was ever kept at prisons and that prisoners, even if entitled to a higher grade diet, were all entered in the normal registers kept in prisons.

On the evidence before him, the magistrate found it established that the appellant had received cash from the witness Julius Lyimo on the local purchase orders he had handed to him and that there were never detained in the prison such men as named in the local purchase orders. He therefore found that the local purchase orders were false and that the appellant had himself pocketed the monies he received from the witness Julius Lyimo. So much for the facts.

In law, the magistrate found that the making of the false local purchase orders constituted forgery, and he accordingly convicted the appellant as charged on the

three counts of forgery. With regard to the stealing counts, although the magistrate found as a fact that the appellant had himself pocketed the monies he received from Julius Lyimo, he directed himself in law as follows, and I am afraid it is necessary and only fair to quote in extenso from his judgment:

“The evidence establishes that the accused obtained cash from Lyimo and used himself. This is in accordance with my finding that during the alleged period there were no second class diet prisoners at the accused’s prison. Was the money which Lyimo gave to the accused Government money. The accused knew that there were no second class diet prisoners at his prison, therefore from the beginning he had no intention of paying this money to the Government.

Clearly therefore this money which he obtained from Lyimo never became Government property. It is therefore not correct to state as in the particulars that the accused stole these various sums of money being the property of the Tanzania Government.

However the matter does not end here because an offence under s. 270 of the Penal Code can be committed either by stealing something which is the property of the Government, *or* by stealing something which comes into one’s possession by virtue of one’s employment as a public servant. The question therefore at this stage is did these various sums of money come into the possession of the accused by virtue of his employment? If this is so and the answer to this question is in the affirmative then the accused must be taken to have been acting on behalf of the Tanzania Government and that therefore by s. 262 of the Penal Code the money became the property of the Government.

The nearest case and decision on this point is that again by Spry, J. (as he then was) in *Rajabu Mbaruku v. R.*, [1962] E.A. 669. In that case the appellant was convicted on two counts of stealing by a person employed in the public service – that the appellant being a person employed as a public servant by E.A.R. & H. stole a stated sum of money the property of his employers which came into his possession by virtue of his employment. It appeared that the appellant was instructed to take passengers from Korogwe to Tanga with instructions not to pick up any passenger on route. Contrary to these instructions the appellant did and pocketed the fares.

Spry, J., held that in picking up passengers on route from Korogwe to Tanga the accused deviated from his master’s instructions not to pick up passengers. He was not guilty of stealing as a public servant because picking up passengers was in breach of his duty and the money obtained from the passengers was not therefore received by virtue of his employment. In the course of the same judgment the judge interpreted the meaning of the words “receive . . . any money on behalf of another” in s. 262 P.C. He held that the plain meaning of these words seems to demand that at the moment when he receives the money the receiver must be acting on behalf of another. What is relevant is what is in the mind of the receiver not what is in mind of the payee. Therefore according to this decision in order that the receiver may be said to receive on behalf of another, at the time he is receiving it, he must be receiving it on behalf of another and this he must know in his mind the payee’s mind being irrelevant. This, however according to a later decision in *Burton Mwakapesile v. R.*, [1965] E.A. 407 does not apply to a receiver who is an agent with a duty to receive and account the money to his principal.

Going back to the present case the accused was not employed to feed second class diet prisoners by borrowing money. He was not under a duty to receive money on behalf of the Government from private traders

in order to feed prisoners. When therefore he received the money from Lyimo he was not receiving on behalf of the Government. This he knew very well. Although he succeeded in inducing Lyimo to believe that he was receiving the money on behalf of the Government this does not change the position because it is according to the decision in *Mbaruku's* case (above), the mind of the accused as receiver which is relevant. Therefore unlike Burton Mwakapesile the accused was not under a duty to feed second class diet prisoners. But like Rajabu Mbaruku the accused was engaged in a private enterprise on his own account albeit by using his official position like Nbaruku when he collected fares from his passengers. It is true that while the railways administration in Mbaruku's case suffered no pecuniary loss, the accused's employers in this case the Government suffered very heavily as a result of the accused's misuse of his official position. But the position does not change.

Certainly the accused has put the Government to a lot of expense, but the state of the authorities constrain me to hold that he did not receive these monies from Lyimo by virtue of his employment. I am quite certain that the accused admitted some offence for which he ought to be punished, but he certainly did not commit the offences with which he is charged.

Accordingly with regret I have to acquit the accused on all these three stealing counts."

[The judge dealt with the evidence and continued.]

With regard to the position in law, as the magistrate very properly directed himself, the making of these false local purchase orders constituted forgery, and the appellant therefore was properly convicted on the three counts of forgery.

With regard to the stealing counts, the State Attorney has sought to distinguish this case from that of *Rajabu son of Mbaruku v. R.*, which the magistrate followed, by submitting that in that case, the passengers did not care where the money they paid to the accused there went, whereas here Julius Lyimo intended the monies he paid to the appellant to go to the Government; and also that in that case the accused's employers, that is, the East African Railways and Harbours Administration, did not really suffer any loss, whereas in this instant case, the Government did in fact pay out on these forged local purchase orders. However, with respect, I fully agree with the magistrate, who did consider these particular aspects and found that this case was indistinguishable from that of *Rajabu son of Mbaruku v. R.*, which he felt bound to follow, and did. It must be said at once that, in my view, the magistrate cannot be faulted for this, because he was bound to follow the decision in *Rajabu son of Mbaruku's* case. But I am not so bound. In coming to the decision, Spry, J., in the case cited, very reluctantly followed the English authorities on the interpretation of the expression "by virtue of his employment", remarking that the English cases were based, and I quote: "on a very narrow interpretation". To my mind, they are based on too narrow an interpretation, and I do not feel disposed to follow them. Spry, J., however, felt constrained to follow the English interpretation because of the wording of s. 4 of the Penal Code. However, despite the wording of the section, I do not feel inclined or even constrained to follow the English decisions, particularly now that appeals to the Privy Council have been abolished and English cases have no more than persuasive authority. In his judgment, Spry, J., also considered s. 262 of the Penal Code, the relevant part of which reads –

"When a person receives, either alone or jointly with another person, any money on behalf of another, the money is deemed to be the property of the person on whose behalf it is received . . ."

He was, however, of the opinion that this section could not be called in aid in

such cases, presumably on the ground, as stated by him and quoted by the magistrate in citing the case, that –

“What is relevant is what is in the mind of the receiver, not what is in the mind of the payer.”

This last proposition is, I think, arguable. In any event, as sufficiently indicated, I am not persuaded that the narrow construction put on the expression “by virtue of his employment” by the English authorities should be followed in this country. Accordingly with respect, I must differ from the decision of Spry, J., and hold that in the circumstances of this case, the appellant received the monies by virtue of his employment as a prison officer, that is, a servant of the Government. He should, therefore, have been convicted of stealing as a Government servant, contrary to ss. 265 and 270 of the Penal Code, as charged.

To recapitulate, the appellant’s appeal is dismissed in its entirety, as the sentences imposed, which incidentally have, I am informed, been served, cannot by any stretch be regarded as excessive. The appeal of the Republic is allowed, and convictions are formally entered on the three counts of stealing by a person employed in the public service, as charged.

With regard to sentence, as noted, the appellant at the time of his trial was currently serving prison sentences. The record of the case wherein he was so sentenced is now available, and shows that the appellant was convicted of five counts of theft by a public servant and one count of a corrupt transaction, and he was sentenced to various terms of imprisonment, making in all a substantive sentence of imprisonment for four years. However, this sentence was reduced by this court on appeal, Duff, J., taking into consideration that the appellant had then been in the service for more than fourteen years and that the convictions would, apart from any other penalties, result in the loss of his employment and of his pension rights. In the circumstances, particularly as the appellant is now at liberty, I am not persuaded that I would be justified in imposing a greater substantive sentence than that imposed by the District Court. Accordingly, on each of the convictions for theft by public servant, the appellant is sentenced to imprisonment for two years, to run concurrently with each other and concurrently with the terms of imprisonment he was serving at the time of his conviction.

With regard to corporal punishment, the award which is mandatory on a conviction for a scheduled offence, as is stealing by a public servant, although the age of the appellant is not given in the record of these instant proceedings, it is given in that of the other case referred to as being then forty-eight years, and he will now be nearer fifty. He therefore escapes the award of corporal punishment which would otherwise be mandatory, being over the prescribed age of forty-five years.

Appeal dismissed. Cross appeal allowed.

The appellant appeared in person.

For the respondent:

N. Rweyemamu (State Attorney)

Melas and another v New Carlton Hotel Ltd
[1970] 1 EA 672 (CAM)

Division: Court of Appeal at Mombasa

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Date of judgment: 25 August 1970
Case Number: 15/1970 (154/70)
Before: Spry Ag P, Law Ag VP and Lutta JA
Sourced by: LawAfrica
Appeal from: The High Court of Kenya – Madan, J.

[1] Arbitration – Arbitrator – Disqualification – Whether interest known to both parties at date of appointment disqualifies arbitrator.

Editor’s Summary

The parties submitted certain disputes between them to the arbitration of the senior partner of the firm of advocates who were acting for the appellants. After the filing of the arbitrator’s award the respondent applied to the High Court to have it set aside on the grounds of legal misconduct, but no allegations of moral turpitude or bias on the part of the arbitrator were alleged. Only at the close of the reply for the appellants was it alleged that it was inherently wrong for the arbitrator to have acted. The court upheld this submission, and did not decide the other objections. On appeal –

Held – an interest of which the parties were fully aware at the date of the appointment will not in general disqualify an arbitrator.

Appeal allowed. Application remitted to the High Court for hearing.

Cases referred to in judgment:

- (1) *Eckersley v. Mersey Docks and Harbour Board*, [1894] 2 Q.B. 667.
- (2) *Bright v. River Plate Construction Co.*, [1900] 2 Ch. 835.
- (3) *R. v. Sussex Justices ex parte McCarthy*, [1923] All E.R. Rep. 233.
- (4) *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon*, [1968] 3 All E.R. 304.

The following considered judgments were read.

Judgment

Law Ag VP: The parties to this appeal agreed on 30 September 1966 to submit a dispute existing between them concerning the tenancy of various plots of land in Mombasa to arbitration by J. F. L. Bryson, in accordance with the provisions of the Arbitration Act (Cap. 49), to which I will hereinafter refer as “the Act”, and which was then in force. Mr. Bryson’s award was published on 21 March 1969, and filed in the High Court on 25 March 1969. Before Mr. Bryson entered upon the reference an objection was taken to his appointment, but this was subsequently withdrawn. The record is silent as to who took the objection, and what the grounds of objection were. Mr. Bryson then held hearings on some 21 occasions spread over a period of 11 months.

At the time of his appointment Mr. Bryson was the senior member of the firm of advocates known as

Bryson, Inamdar and Bowyer, a position which he still occupies. The same firm represented the appellants throughout the arbitration, through one of its other members. The respondent were represented throughout the arbitration by the firm of Atkinson, Cleasby and Satchu, who had agreed to the appointment of Mr. Bryson with full knowledge that he was a member of the firm of Bryson, Inamdar and Bowyer.

On 19 May 1969 the respondent filed objections and prayed that the ward be remitted or set aside. The grounds put forward as objections alleged various instances of legal misconduct but none alleged moral turpitude or bias. The hearing of the objection proceedings took place before Madan, J. in Nairobi and began on 25 August 1969, the objectors (the respondents in this appeal) being represented by Mr. Nazareth and Mr. A. C. Satchu, Mr. Inamdar and Mr. Robson appearing for the respondents (the appellants in this appeal). Mr. Nazareth addressed the court for most of the first day. He confined himself to the grounds of objection which had been pleaded. He made no allegation of bias or likelihood of bias against Mr. Bryson, nor did he suggest that Mr. Bryson should not have acted as arbitrator. The matter was then adjourned to 10 October 1969, when Mr. Inamdar addressed the court, after which Mr. Nazareth began his reply, which he had not completed by the end of the day. The next hearing was on 14 October, in the absence of Mr. Inamdar (who had been released by the court because of an engagement in Mombasa) when Mr. Nazareth, at the conclusion of his reply, raised for the first time the objection that it was inherently and manifestly wrong for Mr. Bryson to have acted as arbitrator in view of his connection with the firm of advocates acting for one of the parties. Surprisingly, Mr. Robson seems, from the record, to have taken no objection to this point being raised at so late a stage, without amendment of the notice of objections, and without any prior notice having been given to himself or to Mr. Inamdar. Mr. Robson was obviously taken completely by surprise.

On the same day, 14 October 1966, Madan, J. delivered his ruling and set aside the award, not on any of the pleaded grounds of objection but basing himself on Mr. Nazareth's eleventh-hour submission that it was improper for Mr. Bryson to have acted as arbitrator at all.

The judge, relying on the judgment of Lord Denning, M.R. in *Metropolitan Properties Ltd. v. Lannon*, [1968] 3 All E.R. 304, held that the award must be set aside, not because Mr. Bryson had been shown to be biased, but because people could not be blamed for thinking that perhaps it was not an unbiased arbitration. In the words of the judge –

“It is not necessary that it (the arbitration) must have been biased. It is enough if seemingly there is cause to think so. It is the indefensible position of the arbitrator which leads to that kind of thinking. The court looks at the impression that would be given to other people. An arbitrator in the position of the gentleman in this case should not sit. And if he sits, his decision cannot stand.”

Before this court, Mr. Inamdar for the appellants submitted that Madan, J. had applied a wrong principle, and misdirected himself, in following the *Metropolitan Properties case (supra)*. That case, and such cases as *R. v. Sussex Justices ex parte McCarthy*, [1923] All E.R. Rep. 233, only apply, in Mr. Inamdar's submission, to judges, magistrates and members of tribunals who are officially appointed and are not chosen by the parties. He submitted that in a private arbitration it is quite proper for the parties to choose an arbitrator with an apparent interest, where that interest is known to all parties to the arbitration. Mr. Inamdar referred to such cases as *Eckersley v. Mersey Docks and Harbour Board*, [1894] 2 Q.B. 667 where the engineer to one of the parties was held not to be disqualified from acting as arbitrator, and *Bright v. River Plate Construction Co.*, [1900] 2 Ch. 835, the head-note to which reads –

“An arbitrator named in a reference is not disqualified merely because circumstances may exist or arise such as to cause a suspicion of bias.”

It will be noted that this is the very reason for which Madan, J. set aside the award in the proceedings the subject of this appeal.

In the *Bright* case (*supra*) one of the parties to a submission sought to stay the arbitration on the ground that the arbitrator, a barrister, had intimate professional relations with the solicitors acting for the other party. Cozens-Hardy, J. held that in the case of a private arbitration such as this, the arbitration should not be stayed unless it can be shown that the arbitrator had prejudged the case or had actual bias.

Mr. Wilkinson for the respondents made it quite clear that no imputation could be made against Mr. Bryson's professional reputation and moral character, or any suggestion of bias in the performance of his duties as arbitrator. He supported the decision of Madan, J. on the ground that it was an error on Mr. Bryson's part to have agreed to act as arbitrator in a dispute in which his firm was actively engaged. Mr. Wilkinson distinguished *Eckerley's* case (*supra*) and other cases in which an employee of one party was named as arbitrator, because in those cases the nomination of that employee was provided for in the contract between the parties, and was part of the consideration therefore. This seems to me to be a valid distinction. As regards *Bright's* case (*supra*), Mr. Wilkinson pointed out that it is not binding on this Court, and submitted that it should not be followed, as the holding that actual bias on the part of the arbitrator had to be shown went much too far. Mr. Wilkinson did not press a cross-appeal filed by the respondent.

In my view the *Metropolitan Estates* case (*supra*) which was relied on by the judge has no application to private arbitrations such as the one the subject of this appeal. In such a case, a court will not lightly interfere with an appointment deliberately agreed upon by the parties, even if the person appointed has an interest in the subject matter of the arbitration. The position is, I think, as stated by the Russell on Arbitration (17th Edn.), at p. 119 –

“An interest on which the parties were fully aware at the date of the arbitrator's appointment will not in general disqualify him; nor will the fact that he stand in a particular relationship to the parties or to the matters in dispute, if it can be said that the parties selected him with knowledge that this was or must be so.”

Applying those principles to the facts of this case, it is not disputed that the respondents, who were at all times represented by a firm of Mombasa advocates, knew when they agreed to appoint Mr. Bryson that he was a member of another firm of Mombasa advocates, and they also knew that this other firm was representing the other parties to the submission. With this knowledge they agreed to Mr. Bryson's appointment, and they can only have done so out of respect for Mr. Bryson's qualifications and integrity as an individual. At no time has any suggestion of bias or even of suspicion of bias been made against Mr. Bryson. In these circumstances I can see no valid reason why he should not have acted, and should not continue to act, as arbitrator in the submission the subject of this appeal. I would allow this appeal with costs, and certify for two counsel. I would set aside the order of 14 October 1969, and order that the objection proceedings be remitted to Madan, J. for a decision on the merits – that is to say on the grounds put forward in the notice of objections – as to whether the award should be set aside, remitted to the arbitrator, or upheld. The costs of the proceedings before Madan, J. both prior and subsequent to this appeal should be in his discretion. I would make no order as to costs or otherwise on the cross-appeal.

Spry Ag P: I agree, and as Lutta, J.A., also agrees, there will be an order in the terms proposed by Law, J.A.

Lutta JA: I agree.

Appeal allowed.

For the appellants:

I. P. Inamdar (instructed by *Bryson, Inamdar & Bowyer*, Mombasa)

For the respondent:

P. J. Wilkinson, Q.C. and *A. C. Satchu* (instructed by *Atkinson Cleasby & Satchu*, Mombasa)

Ryan Investments Ltd and another v The United States of America
[1970] 1 EA 675 (CAN)

Division: Court of Appeal at Nairobi
Date of judgment: 11 September 1970
Case Number: 55/1969 (155/70)
Before: Spry Ag P, Law Ag VP and Mustafa JA
Sourced by: LawAfrica
Appeal from: The High Court of Kenya – Kneller, J.

[1] Civil Practice and Procedure – Witness summons – Improperly issued or incapable of being obeyed – May be struck out.

[2] Civil Practice and Procedure – Inherent jurisdiction – Witness summons – Setting aside may be granted.

[2] Civil Practice and Procedure – Inherent jurisdiction – May not be invoked where specific remedy is provided.

Editor's Summary

Summonses were issued by the High Court on the request of the respondent calling upon the appellant companies to produce documents before an examiner appointed by the High Court on letters rogatory under the Foreign Tribunals Evidence Act, 1865. The summonses called upon the appellants to produce the documents referred to in a previous order of the High Court which was annexed. The order was 11 pages long.

The appellants applied to the High Court to set aside the summonses on the grounds that they did not describe with reasonable accuracy the documents which the persons summoned were called upon to produce. The judge found that the summonses did not sufficiently describe the documents but dismissed the application on the grounds that it did not cite any specific provision of the law giving the court jurisdiction to set aside a witness summons. The appellants appealed.

Held –

- (i) there is no specific remedy permitting the striking out of a witness summons which has been improperly issued or is incapable of being obeyed;
- (ii) where the issue of the summons to the particular witness or the summons itself is irregular and the person concerned is not bound to appear in response thereto, it can be challenged by invoking the

court's inherent jurisdiction;

- (iii) on the finding that the summons could not be obeyed, they must be set aside;
- (iv) it is only where there is a specific remedy provided by the law that the inherent jurisdiction of the court cannot be invoked (*Ahmed Hassam Mulji v. Shirinbhai Jadavji* (5) explained).

Appeal allowed.

Cases referred to in judgment:

- (1) *Raymond v. Tapson* (1883), 22 Ch. D. 430.
- (2) *R. v. Baines*, [1909] 1 K.B. 258.
- (3) *Duni Chand v. Pritam Dass* (1925), A.I.R. Lah. 321.
- (4) *Hassam Karim & Co. Ltd. v. Africa Import and Export Central Corporation Ltd.*, [1960] 396.
- (5) *Ahmed Hassam Mulji v. Shirinbhai Jadavji*, [1963] E.A. 217.

The following considered judgments were read.

Judgment

Law Ag VP: This appeal arises out of proceedings instituted in the United States of America against one Raymond John Ryan, who had various business interests in Kenya including being a director or officer of the two appellant companies. It became necessary to examine witnesses in Kenya in connexion with those proceedings, and an examiner was appointed by the High Court in consequence of letters rogatory issued by the parties under the Foreign Tribunals Evidence Act, 1856, of the United Kingdom, which has been applied to Kenya by s. 3 of the Judicature Act 1967, in civil matters, and extended to criminal matters by s. 24 of the Extradition Act (Cap. 76). In the course of an application to which the appellant companies were not parties, Farrell, J. gave consideration to the question as to what specific documents and types of documents could be ordered to be produced by Mr. Ryan and the companies with which he was connected. Farrell, J.'s decision as to this was embodied in an 11 page order to which I shall refer hereinafter as the order of 12 July 1969. So far as I understand that order, it was made in connexion with an application for the examiner to be empowered to issue summonses to various named companies to produce before him records covering a specified period of time. When however the summonses were in due course issued, they were issued not by the examiner, but by the High Court, presumably at his request.

These summonses, four in all, were issued on 5 August 1969, addressed to two unnamed "officers" of the appellant companies, and on 16 August 1969, addressed to the two appellant companies, ordering them to appear before the examiner and to bring with them the documents referred to in the order of 12 July 1969, a copy whereof was attached to each summons.

The appellant companies applied to the High Court by notice of motion dated 18 August 1969, to have these summonses "struck out and set aside" on the ground that they did not describe with reasonable accuracy the documents which the persons summoned were called upon to produce, as required by r. 5 of O. 15. The judge who heard the application upheld this objection, in my respectful opinion rightly. It is not a proper compliance with r. 5 aforesaid to attach to a summons in the nature of a "subpoena duces tecum" a copy of an 11 page order and expect the person to whom the summons is addressed to decide for himself which of the many documents referred to (not specifically but only in general terms) in that order he was required to produce before the examiner. Nevertheless the judge dismissed the application because the notice of motion was described as being brought under s. 97 of the Civil Procedure Act, and did not cite any specific provision of the law giving the court jurisdiction to set aside a witness summons. It is against this decision that the present appeal is solely directed. The judge cited two cases decided by the High Court of Tanganyika as authority for the proposition that no application can be brought under s. 97 alone, as it does no more than save the inherent powers of the court. These cases are *Hassam Karim & Co. Ltd. v. Africa Import and Export Central Corporation Ltd.*, [1960] E.A. 396, and *Ahmed Hassem Mulji v. Shirinbhai Jadavji*, [1963] E.A. 217. This latter decision is of particularly high authority, the judge being Sir Ralph Windham, C.J., and with respect it does not support the proposition that no application can be brought under s. 97. What Sir Ralph Windham said was that an applicant could not invoke the court's inherent jurisdiction by citing the then corresponding Tanganyika provision (s. 151 of the Indian Civil Procedure Code) when another remedy was available. He also

cited the following extract from the judgment in the Indian case of *Duni Chand v. Pritam Das* (1925), A.I.R. Lah. 321 that –

“it has been held repeatedly that s. 151 of the Code of Civil Procedure cannot be invoked to help a party who has a remedy provided by law.”

It is common ground that the law of Kenya does not provide a specific remedy which will permit of the striking out of a witness summons which has been improperly issued or is incapable of being obeyed. In these circumstances I agree with Sir William Lindsay, for the appellant, that the judge erred in holding that he could not entertain the application, the subject of this appeal, merely because it was described as being made under s. 97 of the Civil Procedure Act and did not cite any specific provision of the law conferring jurisdiction to set aside an improper witness summons. The question is, in my view, had the judge an inherent discretion which he should have exercised to set aside the witness summonses having found them to be “impossible to obey”, in the absence of specific legislative provision to that effect?

Mr. Morrison for the respondent, having first submitted that a defective witness summons could in no circumstances be set aside, in the absence of machinery to that effect, then conceded that such a summons might be set aside if to allow it to remain in force would amount to an abuse of the process of the court and for no other reason. This submission amounted to an attempt to support the judge’s decision on a ground other than that relied on by him, but as Sir William Lindsay raised no objection, the argument on this submission was allowed to proceed without being made the subject of a cross-appeal. In my opinion Mr. Morrison’s submission is not without merit, but it too broadly stated. In *Atkin’s Encyclopaedia of Court Forms and Precedents* (Vol. 9), p. 75 a form of application to set aside a subpoena is given, to be made by summons in the Queen’s Bench Division, or by motion on notice in the Chancery Division. In the notes on p. 75, the following appears –

“The application is based on the ground that the issue of the subpoena is itself, as regards the particular witness, oppressive and an abuse of the process of the court, or that the subpoena, or the service of the subpoena, is irregular and that the person served is not bound to appear in response thereto.”

I do not see why the same considerations should not apply in Kenya, and why there should not be machinery, by invoking the court’s inherent jurisdiction, to challenge the validity of a witness summons which it is alleged cannot be obeyed.

In *R. v. Baines*, [1909] 1 K.B. 258 it was held that the court had an inherent jurisdiction to set aside a subpoena not issued for the purpose of obtaining relevant evidence; in *Raymond v. Tapson* (1883), 22 Ch. D. 430 it was held that although a party may without leave of the court issue a subpoena, the court will nevertheless exercise a control over this privilege to prevent it being oppressively used.

In the case now under consideration, the judge found that the summonses were defective and impossible to obey. In the absence of specific legislative provision, I consider that he should have set aside the summonses in the exercise of his inherent jurisdiction. Strictly speaking the judge was correct in saying that no application can be made under s. 97 of the Civil Procedure Act, as it does not create jurisdiction but merely makes it clear that the inherent powers of the court are not affected by the enactment of the Act. It was apparent that the application in fact invoked the exercise of the court’s inherent powers. Such an application can be made if no other remedy is available, and a remedy should be provided if the interests of justice so require. The judge’s finding that

the witness summonses could not be obeyed in the form in which they were issued justified, in my view, action to set them aside, and the application although stated to have been made under s. 97 aforesaid should have been treated as if made invoking the court's inherent powers generally. The practice has arisen in East Africa of citing s. 97 aforesaid, or the corresponding section in territories other than Kenya, when the intention is to invoke the court's inherent powers, and although this may not be technically correct it should not be used as a reason for refusing to exercise the Court's inherent powers in a proper case, when it is clear that those powers are in fact being invoked.

For these reasons I would allow this appeal, set aside the order of the High Court dismissing the application to strike out the witness summonses and substitute an order allowing that application as prayed, and order that the appellants' costs in this court and in the High Court be paid by the respondent. The order of the High Court, against which there has been no appeal, for the costs of the defendant, who was not a party to the appeal, will stand unchanged.

Mustafa JA: I have had the advantage of reading in draft the judgment of Law, Ag. V.-P. I agree with his reasoning and conclusion and that the appeal be allowed. I concur in the order proposed by him.

Spry Ag P: I agree with the judgment of Law, Ag. V.-P., and with the order he has proposed, and as Mustafa, J.A. also agrees, it is so ordered.

Appeal allowed.

For the appellants:

Sir William O'Brien Lindsay and K. A. Fraser (instructed by Hamilton Harrison & Mathews, Nairobi)

For the respondent:

A. F. Morrison (instructed by Archer & Wilcock, Nairobi)

East African Standard v Gitau [1970] 1 EA 678 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	14 September 1970
Case Number:	13/1970 (157/70)
Before:	Spry Ag P, Law Ag VP and Lutta JA
Sourced by:	LawAfrica

[1] *Defamation – Identification – Plaintiff identifiable only by persons with special knowledge – Whether libel.*

[2] *Defamation – Innuendo – General impression of words to be considered.*

[3] *Defamation – Innuendo – Criminal offence – Allegation not of a criminal offence – Not made out.*

[4] Defamation – Damages – Small publication – Shs. 24,000/- damages excessive.

Editor's Summary

The appellant published in a newspaper the photograph of a motor car which had been in an accident and which was unidentifiable over an incorrect statement that the driver was nowhere to be seen, no one had reported the accident and no one had been admitted to hospital. The respondent sued for damages for libel and produced as witnesses persons who had seen the car and know it to be his. The judge found the statement defamatory and awarded Shs. 24,000/- damages. The appellant appealed contending that the statement was not capable of bearing a defamatory meaning and was not defamatory and that the damages awarded were excessive.

Held –

- (i) the statement could be defamatory even though only persons with special knowledge of the circumstances could connect it with the respondent;

- (ii) where the allegation made could not constitute a criminal offence, the innuendo that the respondent had been guilty of a crime cannot be sustained;
- (iii) the general impression to be created in the minds of right thinking persons must be the test and not a too close analysis of the words used;
- (iv) the extent of the defamation was slight and the damages awarded were excessive.

Appeal allowed in part.

Cases referred to in judgment:

- (1) *Hough v. London Express Newspaper Ltd.*, [1940] 2 K.B. 507.

The following considered judgments were read.

Judgment

Spry Ag P: On Friday 31 January 1969, there appeared in the East African Standard, a newspaper published by the appellant company, a photograph of a damaged car in a ditch. Below was a caption, which reads as follows –

“Police were mystified yesterday after the 2.00 a.m. discovery of this badly damaged car on the Limuru Road, near Parklands, Nairobi. The driver was nowhere to be seen, nobody reported the accident and there was no news of anyone having been admitted to hospital with injuries as a result. The car, which had taken a sharp bend, uprooted an iron telegraph pole and carried it 30 feet into a ditch.”

The respondent was the owner of the car and had been driving it at the time of the accident. After an exchange of letters, he filed a suit in the High Court against the appellant company claiming damages for libel. The basis of the claim was that the photograph and the caption –

“meant and was understood to mean that the plaintiff had surreptitiously withdrawn himself from the scene of the accident to evade detection or to conceal some clandestine matter, that the plaintiff did not report the same to the police which is a criminal offence and that the accident was so serious as to result in multiple injuries to the plaintiff and to any other occupant of the said motor vehicle.”

The judge found that the respondent had been libelled and awarded damages of Shs. 24,000/-. It is against that decision that this appeal is brought.

Before the appeal was heard, Mr. Malik, for the respondent, raised two preliminary objections. The first alleged that the record had not been prepared in accordance with r. 8 (3) of the Eastern African Court of Appeal Rules, 1954, in that it had not been “bound”. As to this, we think it only necessary to say that since this record was filed, a Practice Note has been issued which we hope makes our views clear and with which we are confident practitioners will in future comply. The objection does not go to jurisdiction, and although under the Rules we have power to dismiss an appeal when the record has not been drawn up in the prescribed manner, we saw no occasion to exercise that power in the present case. The second objection alleged that the grounds of appeal were “vague and omnibus”. We were not satisfied that there was any merit in this submission: we thought the memorandum of appeal left no doubt as to the grounds of objection which it was sought to argue and we rejected the preliminary objection.

It is not necessary to consider all the issues that were argued in the High Court. There were only three

grounds of appeal, which were, whether the

words complained of were capable of bearing a defamatory meaning, whether they were in fact defamatory and whether the award of damages was excessive.

As regards the first of these grounds, it is clear and the judge so held, that the words complained of would not libel the respondent in the eyes of the general readers of the East African Standard, because there was nothing in the photograph or the caption to identify either the owner or the driver of the car: the respondent was only defamed, if he was defamed, to those persons who had special knowledge of the circumstances.

Secondly, it is clear that the caption was not entirely correct. Mr. Hunter, who appeared for the appellant company, conceded that it was incorrect to say that the car was discovered at 2. a.m. and that it had struck a telegraph pole. In fact, it had been discovered at least an hour and a half earlier and it had hit a lamp standard. However, neither of these errors is of any significance. We heard lengthy argument on whether or not the statement that “there was no news of anyone having been admitted to hospital” was to be regarded as correct. The fact was that the respondent had been treated as an out-patient at a hospital. The judge referred to this as a “technically half truthful statement”. Personally, I regard it as of little importance. A statement that no one had been admitted to hospital could not, in itself, possibly be defamatory. The only significance I can see in these words is that they tend to emphasise the statement that no one had reported the accident, because if the driver had been admitted to hospital, that would provide an obvious and reasonable explanation of failure to report. The really significant words are “Police were mystified yesterday . . . The driver was nowhere to be seen, nobody reported the accident . . .” Mr. Hunter argued that these words would be read by a reasonable person as relating to the time of the discovery and as such they were factually correct. I cannot agree. The evidence shows that the police officer who first saw the car went into the Parklands Police Station to record the accident and there met the respondent, who had gone to report it. This was at about 12.59 a.m. The police were not mystified, the driver was seen at the police station and the accident was reported. These are the materially untrue statements in the caption.

It is clear that the words complained of are not in themselves defamatory. The suit was based on two innuendoes which the words were alleged to convey. The first was that the words implied that the respondent “had surreptitiously withdrawn himself from the scene of the accident to evade detection or to conceal some clandestine matter” and the second, that the respondent had been guilty of a criminal offence in not reporting the accident.

I will deal first with the second of these alleged innuendoes. In the High Court and before us it was argued that there was no legal obligation on the respondent to report the accident, and that even if there were any such obligation, not every allegation of the commission of a crime is defamatory. The judge remarked that –

“it matters not that in fact no offence was committed assuming the argument to be correct that this particular accident was not reportable under s. 73 of the Traffic Act. What matters is the reaction and understanding on reading the caption of an ordinary reasonable reader, in this instance even without knowledge of the special circumstances, and, not the reaction of a professor learned in law possessing an inquisitorial mind.”

With respect, I do not think the question can be disposed of quite so simply. The respondent complained of an innuendo that he had been guilty of a criminal offence: if the omission alleged would not have constituted a criminal offence, the innuendo cannot be drawn, whatever other grounds there may be for complaining about the words used. In my view, and I confess to some surprise that

this should be the position, the accident was not one which the respondent was required to report under the provisions of s. 73 of the Traffic Act, (Cap. 403). Consequently, no such innuendo as that pleaded could properly be drawn.

The other innuendo alleged presents a more difficult problem. Mr. Hunter argued that the proper test is whether reasonable people with special knowledge of the circumstances might have regarded the caption as defamatory and he criticised the judge for placing too much reliance on the evidence given by witnesses who said that they regarded it as defamatory. I would agree with the general proposition and I did not understand Mr. Malik to dispute it. I cannot, however, agree with the second proposition. The judge was, undoubtedly, considerably influenced by the witnesses but he did expressly direct himself on the test of the reasonable man.

The test of what is defamatory is whether the words complained of would tend to lower the reputation of the plaintiff in the opinion of right-thinking persons. I do not think this is a case where the words used should be analysed too closely. I think one should look at the general impression they are likely to create in the minds of reasonable persons. I think such a person might reasonably feel that the caption inferred that the driver of the car had tried to conceal his identity and that there was something sinister about it. I do not think that is the inevitable or only interpretation but I think it is a possible and reasonable one. The fact that the imputation may be vague in character does not, in my opinion, prevent it being defamatory. I would therefore hold that the caption was capable of bearing a defamatory meaning.

Having reached that conclusion, I can see no ground for interfering with the judge's finding that the caption was in fact defamatory.

There remains the question of damages. The judge began by saying, and I respectfully agree, that this was not a case for punitive or exemplary damages. He considered at length the respondent's career and his present responsible position in the Civil Service. That is certainly a very relevant factor. He said that "an offer for an apology was turned down". I think, with respect, that this is a misdirection. The respondent's advocates wrote to the appellant company, requesting it to take "immediate remedial action by correcting your false report and to agree to pay suitable damages". The advocates for the appellant company replied, denying that there had been any libel but offering to publish "further particulars of the accident should your client still wish this to be done". That letter apparently received no answer.

The judge did not expressly deal in relation to damages with the gravity of the defamation. Reading his judgment as a whole, and particularly his references to the evidence, he appears to have regarded it as very serious. Witnesses called by the respondent, who knew him well, testified that they were horrified when they read the caption and that it made them wonder if the respondent had been drunk or in bad company and also whether he had lied to them regarding his behaviour following the accident. The judge accepted the evidence of those witnesses, and that of the respondent himself, as the truth. I would accept his finding as to credibility but I think, with respect, that he gave rather too much weight to this evidence. I think it must be looked at with a certain scepticism, because of the almost inevitable tendency of witnesses in suits for defamation unconsciously to exaggerate, out of feelings of sympathy or indignation. I think much of the evidence, even if entirely true, goes beyond what was reasonable. In reality, the extent of the defamation was very slight. I do not think the reaction to it of a reasonable reader with knowledge of the circumstances would have been more than to feel some misgiving and a need for explanation.

Moreover, it must be borne in mind that although this was a publication in a

newspaper, the publication of the libel was only to the small number of persons who knew that the respondent had been the driver of the car.

Taking all these factors into account and giving all due weight to the standing of the respondent. I think the award of Shs. 24,000/- was manifestly excessive. In my opinion, an award of Shs. 8,000/- would have been ample to cover any injury to the respondent's reputation and his own injured feelings. It is not suggested that he suffered any financial loss.

I would dismiss the appeal so far as it is an appeal against the finding of libel but I would allow it as regards the award of damages. I would substitute an award of Shs. 8,000/- for the sum of Shs. 24,000/- awarded by the judge. I would award the appellant company one-third of the costs of the appeal. I would leave unchanged the award to the respondent of the costs in the High Court.

Law Ag VP: I have had the advantage of reading the judgment prepared by the Acting President, which sets out the facts and background relevant to this appeal. The accident happened shortly after midnight on 30 January 1969, near the Aga Khan Hospital in Nairobi, and the respondent received treatment at that hospital shortly afterwards for superficial injuries. After treatment, he hired a taxi to take him home and on the way he reported the accident at Parklands police station at about 1 a.m. Later on the same day several friends and acquaintances of the respondent saw and recognized the damaged car, and telephoned the respondent who told them what had happened. On the next day, 31 January, the East African Standard published a photograph of the damaged car, under which was a caption to the effect that the police were mystified yesterday after the 2 a.m. discovery of the car, that the driver was nowhere to be seen, and that nobody had reported the accident. This account was inaccurate in all these respects; the police were not mystified on 30 January, the accident had been reported, and the driver (the respondent) was to be seen as usual about his normal avocations. To a person with no knowledge of the circumstances, the photograph and caption could not have conveyed an imputation defamatory of the respondent, as the car was not identifiable and the driver was not named. The position however was very different in relation to the persons who had recognized the car on the previous day and who knew it belonged to and was usually driven by the respondent. To such persons the impression might be given that if the newspaper report was correct, then the respondent had given them an untrue account of the circumstances of the accident and had for some discreditable reason tried to conceal his identity from the police. Although as I have said the words used in the newspaper report were not defamatory of the respondent in their ordinary meaning, they were in my view reasonably capable of being understood in a sense defamatory of the respondent by persons having special knowledge of the circumstances. (*Hough v. London Express Newspaper Ltd.*, [1940] 2 K.B. 507). I see no reason for differing from the judge in his findings that, in relation to reasonable persons having special knowledge of the circumstances, the publication complained of was capable of a meaning defamatory of the respondent and that it was in fact defamatory of him. I would dismiss the two grounds of appeal directed against this aspect of the case.

As regards the appeal against damages, I agree with the acting President that the award of Shs. 24,000/- made by the judge was manifestly excessive in the circumstances of this case, for two reasons. Firstly, the libellous imputation was not conveyed to the general mass of readers of the East African Standard, but only to the few persons who had seen the car on the previous day and recognized it as being the respondent's. Secondly, the judge was obviously unfavourably disposed towards the appellants because of what he considered to

be their refusal to publish an apology. With respect, the judge was under a misapprehension in this respect. The appellants were faced with a demand from the respondent's advocate for a correction of their "false report" together with the payment of "suitable damages" for alleged libel within 7 days. In their reply, the appellants' advocates denied that the report was libellous but offered to publish "further particulars of the accident should your client still wish this to be done", an offer which was apparently not accepted. In all the circumstances, I consider that an award of Shs. 8,000/- would have been ample compensation to the respondent for what I do not consider to have been a very serious libel, and I agree with the order proposed by the Acting President.

Lutta JA: I have had the advantage of reading in draft the judgment of the Acting President with which I am in substantial agreement and I would only add a few words.

Mr. Haffirdh Shamte, an employee of the appellant at the material time was sent on 30 January 1969 to report on an accident on the Limuru Road. According to his evidence he went with a photographer to the scene of the accident at about 9 a.m. and after taking pictures of the respondent's car, he telephoned Parklands police station to inquire if the police had any information about the accident. He was told to direct his enquiries to the Traffic Headquarters in the city; he tried to contact a Mr. Shaffi, the information officer at the Headquarters but did not succeed. However, a few minutes before 4 p.m. he spoke to Mr. Shaffi on the telephone and was given certain information. He also made enquiries at the Aga Khan Hospital and obtained certain information therefrom. He then submitted his report to the editor. On the following day, that is, 31 January 1969, there appeared in the issue of the East African Standard, the caption, which is the subject of complaint. Mr. Shamte agreed that the caption was substantially a reproduction of his report.

In his judgment the judge found that the caption was incorrect in the following respects:

- “1. As the accident happened soon after midnight the police could not have been mystified about it at 2 a.m., or at all really because the car must have been seen by Assistant Inspector Charles soon after the plaint. It left the scene. The two of them must have met at the police station before, if only minutes before 12.59 a.m.
2. The police discovered the car much earlier than 2 a.m.
3. The plaintiff received treatment at Aga Khan Hospital where he was registered as a patient. True he was not actually admitted into hospital but this only emphasises the technically half truthful statement.
4. A report was made to police.
5. The evidence of the plaintiff, Robert Kangethe and the entry made by the police officer leaves no room for doubt that the car crashed into an electric pole.”

According to Mr. Shamte's evidence it seems that he had almost the whole of the working day within which to ascertain or obtain the correct information about the accident. He made inadequate attempts to check the facts and I agree with the judge that the report was recklessly prepared on incorrect information, and the appellant must bear responsibility for the consequences. However, I do not question the right of a newspaper in the public interest to describe or comment on any public occurrence as long as that is done fairly and accurately. I think it is clear, and indeed I understood Mr. Malik not to dispute it, that the words in the report are not per se defamatory of the respondent. Mr. Malik

submitted that once the car was identified as belonging to the respondent, the caption became libellous, that is, the caption amounted to an innuendo which was defamatory of the respondent. The principal question which arises is this, what is the meaning ascribed to the caption by the innuendo? In other words, does the caption under the circumstances amount to an innuendo disparaging to the respondent's character? Paragraph 5 of the plaint alleges that the caption meant and was understood to mean that the respondent "had surreptitiously withdrawn himself from the scene of the accident to evade detection or to conceal some clandestine matter that the plaintiff did not report the same to the police which is a criminal offence . . .". Mr. Hunter urged that no meaning can be attached to the caption other than a reference to the state of affairs at the material time. He submitted that a reasonable reader knowing the circumstances would not think that the respondent was hiding something or hiding from the police or drunk. With respect I cannot agree. I think the impression which would be created in the minds of reasonable persons knowing the circumstances would be that there was something discreditable about the respondent's conduct. The innuendo was disparaging to the respondent's character. The caption imputed the commission of a crime by the respondent even though he was not required to report the accident under s. 73 of the Traffic Act. In my view where the words are reasonably capable of being understood as imputing the commission of a crime by a person and are so understood by reasonable persons, those words are defamatory of that person notwithstanding the latter in law not having committed an offence. In my view the caption was likely to be understood in a libellous sense by reasonable persons who knew the circumstances and it was in fact libellous of the respondent. For these reasons I would dismiss grounds 1 and 2 of the appeal.

With regard to ground 3 of appeal, I agree with the Acting President that the award of Shs. 24,000/- by the judge was excessive for the reason that the publication of the libel was limited to very few people; the number of persons to whom it was published was very small – about six in all. There was no evidence that it was published to the readers of the newspaper at large. In the circumstances the sum of Shs. 8,000/- would be reasonable to compensate the respondent for the injury suffered as a consequence of the libel. I agree with the order proposed by the Acting President.

Appeal allowed in part.

For the appellant:

A. E. Hunter (instructed by *Daly & Figgis*, Nairobi)

For the respondent:

M. T. A. Malik (instructed by *A. H. Malik & Co.*, Nairobi)